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ABSTRACT

The primary objective of this study is to aid policy makers - state and federal officials, accreditation officials, and university administrators - in making decisions concerning the regulation of postsecondary external degree programs. The purpose of this project is to identify the legal and regulatory issues that the operation of these programs create and to recommend alternatives for the design of a regulatory framework that will permit experimentation and growth. The methodology employed consisted primarily of analysis of primary legal sources (statutory analysis; case law analysis; and the use of secondary materials such as law review activities) as well as books and studies on the external degree movement. The study is organized into seven sections: (1) a description of what is happening to traditional, accredited institutions of higher education; (2) definitions; (3) case of quality control of external degree programs and nontraditional study; (4) assessment of state legislation that might have an impact on external degree programs; (5) description of the role that the accreditation associations play in controlling the quality of postsecondary education, with an assessment of their capability to respond to external programs; (6) description of the present federal roles regulating external degrees; and (7) a summary. Supporting appendixes include a summary of the laws that govern out-of-state accredited institutions, and analysis of each state's incorporation requirements, accreditation association guidelines, and a resource bibliography. (Author/PG)

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LEGAL AND OTHER CONSTRAINTS TO THE
DEVELOPMENT OF EXTERNAL DEGREE PROGRAMS

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Volume I

Final Report

Performed Under Grant NE-G-00-3-0208
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The conclusions and recommendations in this study are those of the principal investigator and do not reflect the views of the Columbus School of Law, Catholic University, the National Institute of Education or any other agency of the United States Government.

PREFACE

This study was made possible by Grant No. NE-G-00-3-0208 from the Career Development Program of the National Institute of Education to the Columbus School of Law, Catholic University, which in turn, sub-contracted to Richard S. Granat, the principal investigator.

William A. Kaplin, Associate Professor of Law, was Legal Advisor to the project and was of invaluable assistance in clarifying technical points and providing guidance and counsel to the project investigator and the research staff; he was also primarily responsible for completing the legal analysis in Sections 4.3 and 5.3.3 to 5.3.8 of this Report.

The field research was conducted by a team of law students at Catholic Law School, Denise Fort, Jonathan Lash, and Judith Kincaid.

Denise Fort was particularly indispensable. She was primarily responsible for completing the legal analysis in Sections 4.4 and 5.3.2 of this Report and prepared Appendix A; her efforts are greatly appreciated.

Eric E. Jackson, a management consultant specializing in innovative postsecondary education programs, provided insights on the management problems of academic institutions.

The author is grateful for the assistance of Dr. Morris Keeton, Provost of Antioch College who generously provided information on the problems that non-traditional academic institutions have experienced with state agencies and Stephen ^{PLUMER} ~~Plumer~~, formerly Dean of ^{DEVELOPING} ~~Antioch~~ Pro-grams at Antioch who read the first draft in its entirety and provided another perspective on many points. We would also like to thank Nevzer Stacey, Government Technical Representative for the National Institute of Education for her encouragement and guidance.

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Although many individuals contributed to the study, the conclusions and recommendations are those of the principal investigator and do not reflect the views of the Columbus School of Law, the National Institute of Education, or any other agency of the United States.

Although this investigation is limited in scope, it is hoped that it will stimulate further research and that the findings and recommendations contained in this report will prove helpful to policy-makers who are faced with making decisions on the design of education innovative postsecondary programs.

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1.0 EXECUTIVE SUMMARY

1.1 Purpose of the Study

1.2 Methodology

1.3 Organization of the Study

1.4 Summary of Findings and Recommendations

1.0 EXECUTIVE SUMMARY

1.1 Purpose of the Study

The primary objective of this study is to aid policy-makers --state and federal officials, accreditation officials, and university administrators - in making decisions concerning the regulation of postsecondary external degree programs.

Our hypothesis is that the existing legal and administrative structure for regulating postsecondary programs does not anticipate the proliferation of external degree programs and other forms of non-traditional study. The purpose of this project is to identify the legal and regulatory issues that the operation of these programs create and to recommend alternatives for the design of a regulatory framework which will permit experimentation and growth.

1.2 Methodology

The methodology employed to conduct this study consisted primarily of analysis of primary legal sources, e.g., statutory analysis; case law analysis; and the use of secondary materials such as law review articles; as well as books and studies on the external degree movement.

In addition, a telephone and letter survey was conducted to solicit information from each state educational agency on their authority to regulate accredited institutions within their state. The survey was designed to verify each state's statutory authority for regulating external degree programs and to ascertain the attitude of state administrative agency officials toward innovative education.

The study was also augmented by a number of in-depth interviews with educators with experience in non-traditional education programs.

The project originally contemplated a field research phase which was designed to empirically verify whether there were in fact obstacles to the development of external degree programs created by the accreditation associations and state regulatory agencies.

was deleted from the report at the request of the sponsor and as a result

Because of limited resources, the only field research conducted were the two case studies which are based on interviews. Legal conclusions are based on an analysis of primary legal sources, such as state statutes and case law. Further research on the subject of this Report should include an empirical study of the constraints to the development of innovative education programs as experienced by institutions of higher education.

1.3 Organization of the Study

The study is organized into seven sections. Section 1.0 is a description of what is happening to traditional, accredited institutions of higher education. The purpose of this section is to provide a context for understanding the external degree movement. Section 2.0 is definitional. It describes four major types of external degree programs and institutions and relates them to the changes taking place in higher education. We argue in this section that the external degree movement is not merely an extension of earlier adult education efforts, but represents deep dissatisfaction with the higher education system as it is presently constituted and is an adumbration of coming fundamental changes in the delivery system for higher education in this country. Section 3.0 presents the case for quality control of external degree programs and non-traditional study. Section 4.0 is an assessment of state legislation which might have an impact on external degree programs. In this section we also analyze the limits of state power to regulate external degree programs. A model statute, prepared by the Educational Commission on the States, which is designed to provide a basis for state approval and licensing of postsecondary institutions and their agents, is analyzed in terms of its impact on external degree programs and non-traditional studies. Section 5.0 is a description of the role that the accreditation associations play in

controlling the quality posts secondary education with an assessment of their capability to respond to external degree programs. We also assess the possibilities for reform of the accreditation associations through use of the judicial process. Section 6.0 is a description of present federal roles regulating higher education and an assessment of the federal government's potential for regulating external degrees. Section 7.0 is a summary of our findings and an analysis of the implications that result from them. Specific recommendations on the respective roles of the states, the accreditation associations, and the federal government are submitted.

Volume II contains supporting appendices, including a summary of the laws of each state which govern and apply to out-of-state accredited institutions of higher education; an analysis of each state's incorporation requirements for colleges and universities; a copy of the model statute prepared by the Educational Commission on the States, accreditation associations guidelines, and a resource bibliography.

1.4 Summary of Findings and Recommendations

Our major findings are:

--The American higher education system is geared primarily to the 18-21 year old residential student. It is not designed to serve other large learner groups such as post-college age adults; those who must retrain in mid-career; and those who are faced with increased leisure time. (Section 2.0)

--Because of a declining birthrate, the number of enrollments in the 18-21 age group, is declining, which together with the impact of inflation has created a financial crises among private institutions of higher education. (Section 2.3) State appropriations to public institutions are also leveling off. Finally, federal assistance to institutions of higher education is declining. (Section 2.3)

--The external degree movement is not simply an extension of existing adult education efforts. The external degree is a response to societal forces which are impacting on the higher education system. The external degree is symbolic of fundamental changes now occurring in the higher education delivery system. (Section 3.0)

--The rapid growth of the external degree movement has created a need for quality control. Under financial pressure, non-profit and public accredited institutions have started external degree programs which are inadequate. Abuse of consumer rights by accredited institutions has been reported and the tendency is increasing. Although the problem of consumer fraud in higher education has existed for some time, the emergence of the external degree strains the existing regulatory system beyond its capacity. Unless a more effective regulatory framework is created which gives legitimacy to the external degree, it will be crushed by the attacks of traditionalists with a vested interest in existing educational practice. (Section 3.3)

The States

--There is little uniformity in state responses to higher education. State statutory schemes vary from absence of any mention of higher education to far-reaching legislation that assumes vast powers over higher education. In general, non profit, non-vocational, regionally-accredited institutions of higher education are often free of any government regulation. (Section 4.1)

--The attitude manifested by most states toward innovative education is at present one of indifference. Of those states which do in some manner supervise private higher education, the majority exempt accredited institutions, thus leaving whatever regulation that is to be done to a private group. In those states where statutory provisions exist for the regulation of private higher education, special provisions for innovative education are rare, and many administrative standards are obsolete and will retard the development of the external degree. (Section 4.2)

--It is becoming evident that some state educational agencies are restricting the activities of out-of-state institutions in order to protect the shrinking markets of in-state institutions. This is being done under the guise of "quality control." (Section 4.2)

--State regulation of higher education will be subject to the restrictions of the Commerce Clause of the U.S. Constitution to the extent that higher education activities can be characterized as "interstate" within the meaning of the clause. States' regulations in education may be invalid under the Commerce Clause if their predominant purpose and effect is to protect local economic interests at the expense of interstate commerce. States must treat interstate education activities in an even handed, non-discriminating manner. (Section 4.3)

--A state cannot require the registration of a foreign school whose business is exclusively (or almost exclusively) interstate, nor can a state exclude a foreign corporation engaged in interstate commerce except for the most compelling reason. (Section 4.3)

--In general, a state acting under its police powers, may regulate academic institutions in the public interest, subject to the limitations of due process law. Substantive due process requires that there be a manifest need which affects the health, morals, or safety of the public generally, and that regulations not be arbitrary, discriminatory, or otherwise unreasonable. Procedural due process requires that reasonable notice of violation must be given, there must be a hearing with the right to confront and cross-examine witnesses, counsel must be permitted, and a record must be made. (Section 4.4)

--There is an urgent need for uniform state legislation, to be passed in each state, modeled after the legislation proposed by the Educational Commission of the States (See Appendix C), with the following caveats: (1) The states should focus on the enforcement of administrative standards and refrain from mandating specific educational requirements; (2) There should be specific provisions that apply to innovative, external degree programs; (3) The accreditation associations should be relied on for judgments on the educational quality of a program, but should not be relied on for enforcement of administrative standards; and (4) States must give more deference than they have to the requirements of due process and the Commerce Clause of the U.S. Constitution. (Section 4.5)

The Accreditation Associations

--The regional accreditation associations provide too little regulation of higher education rather than too much. Membership in a regional accreditation association is based in large part on formal and structural criteria. Many of the standards employed by the accreditation associations are geared for traditional residential programs, imposing constraints on the development of external degree programs. There is a tendency for the accreditation associations to discriminate in favor of the traditional institutions, as opposed to external degree institutions, because of the large vested interest that the association's controlling membership have in traditional practices. (Section 5.2)

--The courts are not likely to intervene substantially into the substantive decisions of accrediting agencies, but can be expected to exercise some control to protect the public interest (5.3.2) under anti-trust, constitutional, and common law theories. All three theories, however, permit considerable judicial deference to accrediting agencies up to the point where an accrediting judgment appears to have substantial adverse impact upon the affected school or program. And then, under all theories, the accrediting agency can nevertheless prevail if its restraint or innovation is demonstrated to be "reasonable" in light of its own purposes and in light of public policy consideration. (Section 5.3)

The Federal Government

--Federal regulation of the quality of postsecondary education is limited. The Office of Education and the Veteran's Administration rely on the accreditation associations to determine the eligibility of nonprofit institutions of higher education for federal funds. The jurisdiction of the Federal Trade Commission does not extend to non-profit, eleemosynary institutions. There is no focus within the federal government for coordinating efforts to protect students from consumer fraud.

Recommendations and Implications of Findings

Many of the alternatives discussed in the body of the report (see generally section 7.0) require new legislation. It is recommended that the states quickly pass uniform state legislation which focuses on the enforcement of administration standards. It is also recommended that the Veterans' Administration approve only programs of study, as they do for proprietary, vocational schools, rather than approve institutions. It would also be desirable for the jurisdiction of the Federal Trade Commission to be extended to non-profit educational corporations. Unfortunately, there is much Congressional reluctance to give the federal government more power to regulate in the field of education. Therefore, it is proposed, in the alternative, that a new specialized agency be created to fill the need for quality control of external degree programs. Such an agency could be organized within the framework of the existing accreditation associations, such as a national commission of the new Council on Postsecondary Accreditation. If the accreditation associations fail to respond to the need for quality control of external degree programs, a new organization perhaps called the National Council of External Degree Granting Institutions, should be organized to serve the public. An agency oriented toward the consumer could publish program evaluations and rate institutions. It could develop and apply verifiable standards which measure the performance of an institution in objective terms.

Establishment of a new accreditation agency is the fastest way to fill a vacuum. Congressional passage of new legislation authorizing direct federal regulation of postsecondary education could take forever and may never happen. Without effective quality control, the quick buck artists and confidence men will move into the field, tarnishing it for everyone. A private, voluntary agency, organized along different lines than the existing accreditation associations, seems to be a modest and realistic proposal which is consistent with American practice and which could be implemented in a relatively short period of time.

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2.0 THE STATE OF HIGHER EDUCATION

2.1 Introduction

2.2 Current Criticism of Accredited Higher Education

2.3 Financial Status and Cost of Higher Education

2.4 Enrollment Patterns

2.5 Productivity of Higher Education

2.6 Conclusion

2.0 THE STATE OF HIGHER EDUCATION

2.1 Introduction

This section of the report identifies significant trends in higher education which shape the legal issues which arise in the operation of non-traditional education programs. It is impossible to understand the external degree movement without an understanding of the forces affecting the traditional academic college or university. The impact of these forces on the financial status of accredited institutions of higher education, the productivity of traditional higher education, and the emergence of non-degree alternative educational systems as a consequence are explored. Section 3.0 is a discussion of the various kinds of external degree programs, categorizing them into four major program types, and presenting the rationale for quality control of external degree programs.

2.2 Current Criticism of Accredited Higher Education

The "new" criticism of higher education can be traced to the Report on Higher Education of the Newman Task Force on Higher Education, published in 1971.^{1/} Less than four years ago, the U.S. Department of Health, Education, and Welfare asked Frank Newman, a Stanford University administrator, to chair a task force on higher education. The findings of the nine member task force have aroused more controversy than any similar effort in the history of American higher education, for it raised fundamental questions on the effectiveness of the higher education system from the point of view of the needs of society. Together with the work of the Carnegie Commission on Higher Education, and other recent studies on the effectiveness of institutions of higher education, a disturbing picture of established higher education emerges. Accredited higher education is said to be a secretive and oligopolistic enterprise, inefficiently serving the needs of society.^{2/} According to these sources, traditional colleges and universities and their constituent faculties and administrations, suffer from the following deficiencies:

- They are organized primarily to serve the 18-21 college age group, resulting in the creation of isolated communities which are separate from the mainstream of society, staffed by insulated faculty who have never had positions of responsibility outside of the educational system.
- They lack diversity of institutional mission, with every institution emulating the academic model of the great universities, oriented towards the discovery of theoretical knowledge, rather than the dissemination of practical knowledge and the development of skills.^{3/}

¹ Newman, F., Chairman, Report on Higher Education, (1971).

² See generally, Jencks and Riesman, The Academic Revolution (1969); Ridgeway, The Closed Corporation (1968)

³ See Hodgkinson, Institutions in Transition (1970) p Jencks and Riesman, at 25-26.

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- They overemphasize the liberal arts and the humanities, although there has been a clear shift in demand for career education programs which are designed to teach a person how to do something.^{4/}
- They have become large bureaucracies, which stress system-wide planning, and centralized administration. The sheer size of many multi-campus systems is eroding the flexibility, differentiation, and individual responsiveness which characterized higher education during the first part of this century. ^{5/}
- They limit access for women, adults, and minority groups and other types of students who could benefit from higher education. Rigid policies on residence requirements, the ability to transfer credits, insistence on full-time study, have become barriers and impose unnecessary hardships on major subgroups within the population. ^{6/}
- They encourage forms of financial subsidy and loan programs which are geared to the full-time, residential student and do not encourage students to have experience outside of formal education. The need to keep dormitories filled and physical plants operating determines the kind of student financial assistance, rather than genuine market need.
- They prevent the introduction of new technologies which would increase the cost/effectiveness of instructional programs. Cable TV, micro-fiche publishing, and programmed material are resisted by tenured faculty afraid of technological unemployment. ^{7/}
- They are not organized for performance and results. Budgets are based on cost, particularly in public universities, rather than outputs. ^{8/}

⁴ See generally, Abramson, P., Career Education: Fad or Fundamental? The Growth in Elementary, Secondary, Post-Secondary and Proprietary Markets 1972-1977 (1972).

⁵ See generally, Report on Higher Education, Supra, note 1, Chapter 3, Bowen, The Governance of the Multi-Campus University (1970).

⁶ See generally, Report on Higher Education, Supra, Note 1, Chapters 10 and 11; Gould, Today's Academic Condition (1970); Commission on Non-Traditional Study, Diversity by Design (1973); Cross, "New Students and New Needs", in Higher Education (1972); Cross, "New Students in a New World," in The Future in the Making ed. P.W. Vermaile (); Medsker, L., and Tillery, P. Breaking the Access Barriers (1971).

⁷ Diversity by Design, at 46.

⁸ Drucker, Management: Tasks, Responsibilities, Practices (1974) at 174.

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In their defense, universities claim that these deficiencies are the result of inadequate financial resources, and that the lack of funds is the primary cause of its problems. On the other hand, it can be argued that the organization, financing, and structure of higher education are creating a financial crises, which is driving the nation's colleges and universities to bankruptcy. The next section documents the dimensions of this financial crisis.

2.3 Financial Status and Cost of Higher Education

Recent studies have begun to focus attention on the financial crisis in higher education. Earl F. Cheit, in a now famous study,^{9/} reports that on the basis of 41 on-site studies of colleges and universities, 71 percent were determined to be headed for financial trouble or are already there. The list of those found to be in trouble includes both public and private institutions, including some of the country's most prestigious universities. Since the 41 institutions selected in the Cheit study were not chosen as a random sample of all 2,729 institutions of higher education in the country, it does not mean that 71 percent of all schools in the United States are in financial trouble or headed for it or that 29 percent are not. Nevertheless, Cheit concluded that the group of schools headed for financial trouble included in the study was sufficiently representative to infer that it is likely that the gap between expenditure and income is universal among the schools included and is likely to be felt in varying degrees in the near future.

The Cheit study was completed by November, 1970, and utilized data for the years 1967-68, and 1968-69. A more recent and comprehensive study of the financial status of private colleges and universities was completed by William W. Jellema in September, 1973, entitled From Red to Black?^{10/} The study was undertaken to assemble up-to-date financial data on all accredited private higher education, and

⁹ Cheit, The New Depression in Higher Education (1971) at 139. See also, Bowen, The Economics of the Major Private Universities (1968).

¹⁰ Jellema, From Red to Black? The Financial Status of Private Colleges and Universities (1973).

all but twenty-nine of the nation's private, four-year, accredited institutions were surveyed. The response to the questionnaire was in excess of 75 percent and the author concluded that the institutions in the study appeared to be representative of all private institutions of higher learning.^{11/}

Jellema concluded that a large percentage of the nation's private educational institutions were in financial difficulty and that they are surviving by borrowing from endowment funds, cash flow, and cutting back new programs and unnecessary services. Projecting current trends into future years reveals that 254 institutions in the original study sample would completely deplete their liquid assets within ten years, and projecting nationally, out of a total of 762 private, accredited four-year colleges and universities, 365 would become insolvent during the same period.^{12/}

A study conducted in Texas indicated that, if the trend from 1963-64 to 1967-68 were to continue, by 1985 the cost per student (in constant 1968 dollars) in major independent universities in Texas would be \$36,859 and the cost per student in senior (four-year) colleges in the state would be \$17,074. If the percentage covered by tuition were the same in 1985 as in 1968, the student at a private university would be asked to pay \$17,324 per year and the student at a senior college would be confronted with a tuition charge of \$9,695^{13/}

A study of ten prestigious colleges and universities published in 1967 showed a progressive decline in annual operating surplus between 1961-66, and projected deficits by 1967^{14/}

¹¹ Jellema, *Ibid*, at 167.

¹² Jellema, *Supra* Note 9 at 23, 24.

¹³ Liaison Committee on Texas Private Colleges and Universities, "Pluralism and Partnership: The Case for the Dual System of Higher Education," monograph, p.41.

¹⁴ Study of Rising Costs at Ten Universities, (1957), cited by Earl F. Cheit in The New Depression in Higher Education (1971).

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Public institutions are faring only slightly better. In a study conducted by the Center for Research and Development in Higher Education at the University of California, it was found that twice as many states had a reduced proportion of the state budget for higher education as did states with an increased proportion. With the exception of a few states, the proportion of the state budget going to higher education will be no greater in 1980 than it is now. Most states are already at a funding plateau and others will quickly reach it. State universities, for the first time, are beginning to experience deficit operations as enrollment drops and fixed expenses continue.

What is happening is that costs have continued to rise at a much faster rate than revenue. Instruction costs are high with no increase in productivity. Building costs are higher. Maintenance costs are increasing. Students and their parents continue to demand auxiliary services, and inflation is throwing all earlier estimates out the window. Most importantly the customer is disappearing: changes in enrollment patterns are underlying the financial problems.

2.4 Enrollment Patterns

Higher Education's financial problems stem from shifts in enrollment patterns which in turn are caused by basic demographic shifts in the population.

State colleges, for example, will reach a dreaded watershed in September as fewer freshmen show up than last fall, for the first over-all decline in first-year students in peacetime memory.^{15/}

Although the number of persons reaching the college age of 18 will not begin to taper off until the end of the decade, the proportion of high school graduates who finally choose college has declined steadily in past years, from more than 60 percent in the late 1960's to less than 58 percent this year.

Undergraduate enrollment decreased in private universities in 1971 by 1.5 percent and held for no gain in private four year colleges. In 1972 enrollment fell off still further in the private sector, declining 2.1 percent in private universities and 1.7 percent in private four year colleges.^{16/}

The National Center for Educational Statistics and the Carnegie Commission on Higher Education recently revised earlier enrollment projections.

The National Center reported that:^{17/}

- 637,000 fewer students are thought to have enrolled this fall than previously estimated. (1973)
- 578,000 fewer students are expected to enroll next fall than previously estimated. (1974)

The Carnegie Commission now foresees:

- 1.5 million fewer students in 1980 than originally estimated.
- 3.4 million fewer students in the year 2000 than originally estimated.

¹⁵ Peterson, I., "The Next Freshman Class: Shifting Pattern," The New York Times, May 5, 1974, p. 52.

¹⁶ See generally, Jellema, Supra note 9, Chapter II.

See generally, Snell, Helene I., "Enrollment Trends in Higher Education," Research Currents, ERIC Clearinghouse on Higher Education, June, 1973; Peterson, Richard E. American College and University Enrollment Trends in 1971. Davis, Robert F. "Rate of Increase in College Enrollment Drops," in American Education 9 (1973) 29.

¹⁷ The Chronicle of Higher Education, Volume VIII, October 1, 1973, Number 2.

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REVISED PROJECTIONS OF FALL ENROLLMENTS, 1972-74
(in thousands)

Enrollment	1972*	1973	1974	Percentage Change	
				1972-73	1973-74
Total	8,265	8,370	8,500	+1.3%	+1.6%
Men	4,701	4,695	4,700	0	0
Women	3,564	3,675	3,800	+3.1%	+3.4%
Full time	5,647	5,699	5,800	+1.0%	+1.8%
Part time	2,618	2,671	2,700	+2.0%	+1.0%
Undergraduate and 1st professional	7,322	7,407	7,500	+1.2%	+1.3%
Graduate	943	963	1,000	+2.1%	+3.8%
Public institutions	6,158	6,256	6,400	+1.6%	+2.3%
Private institutions	2,107	2,114	2,100	0	0
4-year institutions	6,473	6,512	6,600	+1.0%	+1.4%
2-year institutions	1,792	1,858	1,900	+3.7%	+2.3%

* Final figures

SOURCE: NATIONAL CENTER FOR EDUCATIONAL STATISTICS

OLD AND NEW ENROLLMENT PROJECTIONS, 1970-2000
(in thousands)

Enrollment	1970*	1980	1990	2000	Percentage Change		
					1970-80	1980-90	1990-2000
Projections made in 1971	8,649	13,015	12,654	16,559	+50.5%	-2.8%	+30.9%
Undergraduate	7,443	11,062	10,587	14,123	+48.9%	-4.5%	+33.4%
Graduate	1,206	1,933	2,068	2,436	+60.3%	+7.0%	+17.8%
Projections made in 1973	8,649	11,446	10,555	13,209	+32.3%	-7.8%	+25.1%
Undergraduate	7,443	9,720	8,882	11,221	+30.6%	-8.6%	+26.3%
Graduate	1,206	1,726	1,673	1,988	+43.1%	-3.1%	+18.8%

* Final figures

SOURCE: CARR-SAunders COMMISSION ON HIGHER EDUCATION

Underlying these enrollment projections are assumptions about the changing composition of the population. Ten years ago when colleges administrators couldn't build enough dormitory space, they should have been aware of the changing demographic pattern in the U.S. population:

- The actual number of five-year olds dropped 15 percent between 1960 and 1970. These are the college youth of 1970 and beyond. 18/
- The actual number of births dropped three percent between 1970 and 1971 and nine percent between 1971 and 1972. These are the potential freshmen of 1988 and 1990. 19/
- The nation's birthrate is at its lowest point in history, at a rate below zero-population growth, and it has not yet stabilized at that rate.

The Census Bureau now estimates a sharp drop in the number of college-age youth after 1982, almost paralleling the sharp rises during the 1960's. 20/

The most important fact about these enrollment projections is that they are based upon projections of the future number of typical 18-21 age college student. 21/ The projections do not account for the extension of higher education to new types of students and the possibility that continuing education throughout life could become an accepted pattern in our society.

¹⁸ U.S. Department of Commerce, Bureau of the Census. Current population reports, population estimates and projections. Series P-23, No. 476, February, 5.

¹⁹ U.S. Department of Health, Education, and Welfare, Public Health Service, Monthly Vital Statistics Report, provisional statistics. December 26, 1972, 29 (10), 1.

²⁰ U.S. Department of Commerce, Bureau of the Census. Current Population Reports 'Characteristics of American Youth: 1972'. Series P-23, No. 44, March 1973.

²¹ See generally, Glenny, "The '60s in Reverse," in VII The Research Reporter 1 (1973).

These new students could include^{22/}

- those who could not afford the cost of higher education during the traditional "college years;"
- post-college age adults for whom no educational opportunities were present at an earlier age;
- those who want to expand and enrich their understanding of specific subjects;
- those whose educational progress has been interrupted by illness, military service, or other temporary moves;
- those who become technologically unemployed and must retrain in mid-career;
- those who are faced with increased leisure time;
- those whose racial or ethnic identity have prevented them from full participation in the traditional higher education system;
- those who are constrained by the needs of small children, elderly relatives, and the invalid;
- those who must move frequently in order to accompany spouses or pursue careers; and
- those who are in prisons or hospitals or confined by illness in their homes.

Unfortunately, traditional colleges and universities are not geared up to service these emerging student markets, which accounts in part for the increasing tendency of those who desire training in a variety of skills or in career education to attend proprietary and industrial schools. The Educational Policy Research Center at Syracuse reports that the rate of increase in enrollment in these so-called "peripheral" institutions has been greater than in higher institutions, and in the future it will be much greater^{23/}

²² See generally, Cross, "The New Learners" in On Learning and Change, P.65, (1973).

²³ Glenny, Supra Note 21 at 3.

2.5 Productivity of Higher Education

Historically, most industries in the American economy have found ways to increase steadily the amount of output measures by a given amount of inputs--in other words, they have experienced productivity change. Furthermore, industries characterized by rapid growth have generally been those with rapid productivity changes. Using growth in credit hours as a indicator of growth in real instructional output, as June O'Neill has noted²⁴ there has been no productivity change in the production of higher education during the period 1930 to 1967,--and this despite the very high growth rates of higher education.

Higher education institutions, like mental health hospitals, prisons, welfare agencies are "service industries," and one characteristic of service industries is that with more resources, production does not necessarily rise; it may even fall. For example, as academic salaries have risen, teaching loads have dropped.

This general pattern of cost exists at a time when students and communities are demanding more and more from academic institutions. Having responded to so many demands in the past, universities are trying to respond to new constituencies while the faculty are not prepared to cut down on the older ones.

A consequence of these combined developments, in which higher education becomes more and more omnivorous of resources while it becomes less and less able to elicit community support is the situation that David Reisman has termed, "Collision Course."²⁵

²⁴ O'Neill, June, Resource Use in Higher Education, Trends in Output and Inputs, 1930 to 1967, (1971)

²⁵ See generally, Reisman, "Inflation in Higher Education," V5 McGill Journal of Educational (Spring, 1920). See also, Gartner A., and Ritsmann, F., The Service Society and the Consumer Vanguard (1971) for alternative ways to organize service institutions which depend on the consumer as a force in the production of services.

2.6 Conclusion

Accredited higher education, e.g., traditional colleges and universities, which represent the mainstream of postsecondary education, display all the characteristics of a dying and moribund industry. Highly fragmented, resistant to the introduction of technological innovation, and oriented towards the maintenance of an obsolete cost structure which fitted yesterday's need, rather than tomorrow's, the nation's colleges and universities, are slowly pricing themselves out of existing markets and literally going bankrupt.^{26/} During the latter part of this century accredited higher education as it has been known is being completely transformed in structure, in financing, in methods of instructional delivery, in mission and purposes, and in staffing and organization. Many institutions are simply going out of existence. Others are consolidating and new institutions are merging to fill the gaps which now exist. The clear direction of change is toward a broader, more flexible, more competitive system of postsecondary education. In the context of these fundamental changes, external degree programs are not a simple extension of adult extension education programs, but are the forefront of a movement to redefine higher education, its content, and method of delivery. The next section identifies and describes major types of emerging external degree programs and examines the need for quality control.

²⁶ As this study is being edited, the Washington Post reported on September 1,

1974:

"Across the broad swath of academia, many colleges and universities are pruning their faculty rolls in a last ditch effort to make ends meet in the face of sharply escalating costs and declining enrollments."

Across the country, the reasons for the academic retrenchment are essentially twofold. Costs have escalated at a staggering rate...And there is a shortage of students. After a period of rapid expansion in the 1960's when post-war baby boom classes were passing through college, enrollments have stabilized and in some cases are falling.

Barnes, B., "Big Question on Campus, Who Will Lose Their Jobs?"
The Washington Post (September 1, 1974) B5.

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3.0 THE EXTERNAL DEGREE MOVEMENT

3.1 What is an "External Degree"?

3.2 Types of External Degree Programs

3.2.1 The Traditional Model

3.2.2 The Technological Model

3.2.3 The Examining Agency Model

3.2.4 The "Rip-Off" Model

3.3 The Need for Quality Control

3.0 THE EXTERNAL DEGREE MOVEMENT

3.1 What is an "External Degree"?

The "external degree" is the latest "innovation" to hit the nation's colleges and universities. Faced with a financial crisis caused by declining student enrollments among the 16-21 age group,^{1/} and increasing demand by other population groups previously excluded from postsecondary education,^{2/} academic institutions are struggling to reshape their programs to respond to changes in the marketplace. Many of these changes are taking place under the euphemism of the "external degree" or "nontraditional studies". The new realities of the marketplace are demanding that the university develop an understanding of the needs, realities, and values of the student, and to look at the student as a client or a customer. Universities are being forced by financial pressures to identify the satisfaction of student needs, as distinguished from faculty needs, as their primary institutional goal. Thus, academic institutions are rethinking their answers to the questions: Who is the student? What is of value to the student? What are the students' unsatisfied wants? Where is the student? One result of this rethinking has led to the development of external degree and other non-traditional study programs.

The movement is growing very fast. The Commission on Non-Traditional Study surveyed 641 programs offered by 1,185 respondent institutions. The Commission's staff estimated that probably between 1,000 and 1,400 innovative programs were conducted by American colleges and universities in 1972. Most of the programs were highly unconventional and only 21 percent of the institutions studied were distinguished by a single non-traditional feature.^{3/}

A useful definition is the one provided by Cyril O. Houle in the leading work on the subject, entitled, The External Degree. An external degree is one awarded:^{4/}

¹ See Sections 2.3 and 2.4.

² See Section 2.2.

³ Commission on Non-Traditional Study, Diversity by Design, at 44.

⁴ Houle, The External Degree, (1973) 16.

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to an individual on the basis of some program of preparation (devised either by himself or by an educational institution) which is not centered on traditional patterns of residential collegiate or university study.

Recognizing that this definition is a negative one, Houle points out that the only "common characteristic at present is a desire to open up the academic system and provide a wide variety of options for a student body no longer made up exclusively of young post-adolescents."⁵/

To illustrate the range of activity possible within the external degree movement⁶/and to illuminate the legal issues of control and

⁵ Id at.

⁶ Some observers of the external degree movement, such as Carol Herronstadt Shulman, interpret the phrase "external degree" broadly to include:

"...a variety of programs designed to deal with acknowledged needs in higher education: greater access to postsecondary studies, more flexible curriculum offerings, and recognition of non-traditional forms of learning."

Shulman, "A Look at External Degree Structures," ERIC Higher Education Research Currents (November, 1972).

regulation that may result, we have identified four basic types of programs:

(1) the traditional model; (2) the technological model; (3) the examining agency model; and (4) the "rip-off" model.^{7/7}

3.2 Types of External Degree Programs

3.2.1 The Traditional Model

The Traditional Model is an ironic label which we have selected to describe almost all present activity in the external degree field which are incremental reforms in the academic programs of traditional institutions of higher education. Although many of these programs are very innovative, and commonly include such features as waiver of residence requirements, provision for independent study, credit for life experience, flexible class scheduling, and the extensive use of lay professionals as faculty, they do not present radical alternatives to the present higher educational delivery system. They retain many of higher education's

⁷John Valley, Director of the Office of New Degree Programs, Educational Testing Service, finds that the non-traditional approaches to academic degrees can be categorized into six major models.

--the administrative-facilitation model, which is a customary degree offered outside the central structure of the university to a specialized clientele, e.g., Bachelor of Science offered by the School of General Studies at Columbia University.

--the modes-of-learning model, which is a new degree pattern of learning and teaching, is responsive to a new clientele which is different from that which it customarily serves, e.g., Bachelor of Liberal Studies of the University of Oklahoma. - aimed at what clientele.

--the examination model, awards credits and degrees on the basis of student performance as evidenced by examination, e.g., New York State Regents Degree.

--the validation model, where an institution evaluates and assesses the student's total learning experiences, e.g., Westbrook College, Portland, Maine.

--the credits model, in which the institution does not itself offer instruction, but offers credit for which it sets standards and vouches for the quality of student programming. There is no American example of this model. A foreign example is the Council for National Academic Awards in England.

--the complex-systems model, results when various external degree programs are merged together to form an external degree system, e.g., Empire State College.

Valley, "External Degree Programs" in Explorations in Non-Traditional Study (1973) at 95.

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familiar characteristics; the use of academic credits to measure achievement and competence; high cost labor for instructional programs, and service to relatively small numbers of students. All such programs share the following common minimal characteristics: (1) the external degree program is sponsored by a nonprofit, regionally-accredited institution of higher education; (2) the program has been approved by the institution's faculty governance mechanism; (3) the program conforms to the regional accreditation association guidelines for non-traditional study programs; and (4) the primary purpose of the institution is operating traditional programs on its main campus.

The University Without Walls consortium, a cooperative venture of 20 institutions organized as the Union of Experimenting Colleges and Universities is one example of what we would label the "Traditional External Degree Program". Such practices as a fixed age group, a set time-frame, the classroom as the principal place of instruction, prescribed curriculum, and grades, are abandoned by colleges participating in the UWW program. Members of the Union are: ⁸/

University of Massachusetts, University of Minnesota, Morgan State, New College at Sarasota, Northeastern Illinois University, University of the Pacific, Pitzer, University of Redlands (Johnston College), Antioch, Bard, Roger Williams, Shaw, Skidmore, Friends World College, University of South Carolina, Goddard, Chicago State University, Franconia, University of Alabama (New College), Hofstra University, Loretto Heights, Staten Island Community College, Stephens, Westminster, University of Wisconsin at Green Bay.

Each college maintains its own autonomy but subscribes to a set of organizing principles developed by the Union

⁸ See generally, First Report, University Without Walls, (1972).

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The UMW allows each student to design his own educational program in cooperation with a faculty advisor. The educational program becomes a contract between the faculty advisor and the student, and the contract becomes the basis for assessing that learning has taken place during the period of time that the student participates in the program. Students use a variety of learning experiences to achieve their objectives: regular course work; internships, apprenticeships, and field experiences; independent study and individual and group projects; travel; programmed material, cassettes and other technological material. There is no uniform time schedule for completing the degree. Students are admitted through each individual participating institution and a review committee at each institution appraises the student's record of achievement and makes the decision about his degree award. Candidates for a degree are recommended to the Union for Experimenting Colleges and Universities. Degrees are awarded jointly by the union and a sponsoring college or university. Approximately 3,000 undergraduate students are presently enrolled in UMW programs.

Another example of a nationwide external degree program are the graduate degree programs of the University of Northern Colorado, a public university which is part of the Colorado State System. ¹⁰/ UNC offers a one-year master program for fully-employed adults in mid-career in such fields as business, public administration, curriculum and instruction, guidance and counseling. The format, schedule, and content of courses are designed to meet the special needs of certain types of adult students, such as U. S. military officers, government officials, and teachers. Courses are frequently held during the week-ends or in three to five day intensive seminars. Many of the faculty members are recruited from:

⁹ First Report, Supra at 4.

¹⁰ Center for Special and Advanced Programs, Catalog, (1973); Bisconti and Gomberg, The Impact of the University of Northern Colorado External Degree Program, unpublished manuscript (1974).

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industry or government and have reputations as both practitioners and teachers. After consultation with an academic counselor, the student may arrange for independent study of practicum courses which translate practical experience into academic credit through on-the-job training or work-study programs. Continuous enrollment allows students to register for any course at any time. Nonsequential scheduling allows students to choose their courses in any sequence. Typically, all courses carry full credit regardless of where they are offered, because there are no on-campus residence requirements. The only requirement for admission to the various degree programs is an undergraduate degree from an accredited institution of higher education. Although only four years old, the program now has over 3,000 participating students in 33 locations distributed among 17 states as far distant from Colorado as Rhode Island, Florida, and the District of Columbia. Over 400 students have graduated from the program.

Both the UWW program and the UNC program are typical of the kind of non-traditional experimentation now being undertaken by traditional institutions of higher education.

3.2.2 The Technological Model

The technological model has been identified as a prototype external degree program but is distinct from others because it is a radical departure from all traditional postsecondary education, delivery systems. In the United States, there have been a number of attempts to change the basic instructional delivery system through the employment of technology; a well known American example is Chicago's TV College^{11/} and a recent effort is the University of Mid-America. All of these programs, including the University of Mid-America, are relatively limited in scope, program content, or both. The best example of the technological model is a foreign one--the British Open University. Because of its significance for the future of higher education and the apparent legal barriers to the establishment of a comparable system within the United States, the British Open University is discussed in some detail.

The Open University was established in 1969 by the British Government as a nationwide educational vehicle which would provide opportunities for fully employed adults to secure undergraduate and graduate education.^{12/} The Open University began operating in 1971, after a two-year development period, and initially served 25,000 students. It presently offers work towards a Bachelor of Arts degree which students earn by accruing six credits, each credit being awarded on the successful completion of one year. Eight credits qualify for an honors degree and students may, if they have the time, take two courses a year.

¹¹ Described in Houle, The External Degree (1973) at III.

¹² The following description was derived from interviews with Anthony Mellor, Director, Open University Department, Harper & Row Publishers, Inc.; Ernest Hunter, Director for marketing, Open University; a site visit to the Open University in England by the senior project investigator at his own expense, notes on file, and review of the following secondary material: Open University, The B.A. Degree Handbook (1973); Open University (Annual Report) 1973; Wagner, "The Economics of the Open University," in Higher Education 159 (1972); Nelson, "The Open University in the United States," 85 College Board Review (1972); Walsh, "The Open University: Breakthrough for Britain?" 174 Science 12 (1971); Brooks, "The First Year's Experience at the Open University," College Management 28 (March, 1972); Lester, "Britain's University of the Second Chance," 10 Continuous Learning 255 (1971); Lewis, "Course Production at the Open University," IV: The Problem of Assessment, British Journal of Educational Technology, 108, (1972).

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The Open University employs concepts and technology that represent a radical departure from traditional higher education delivery systems:

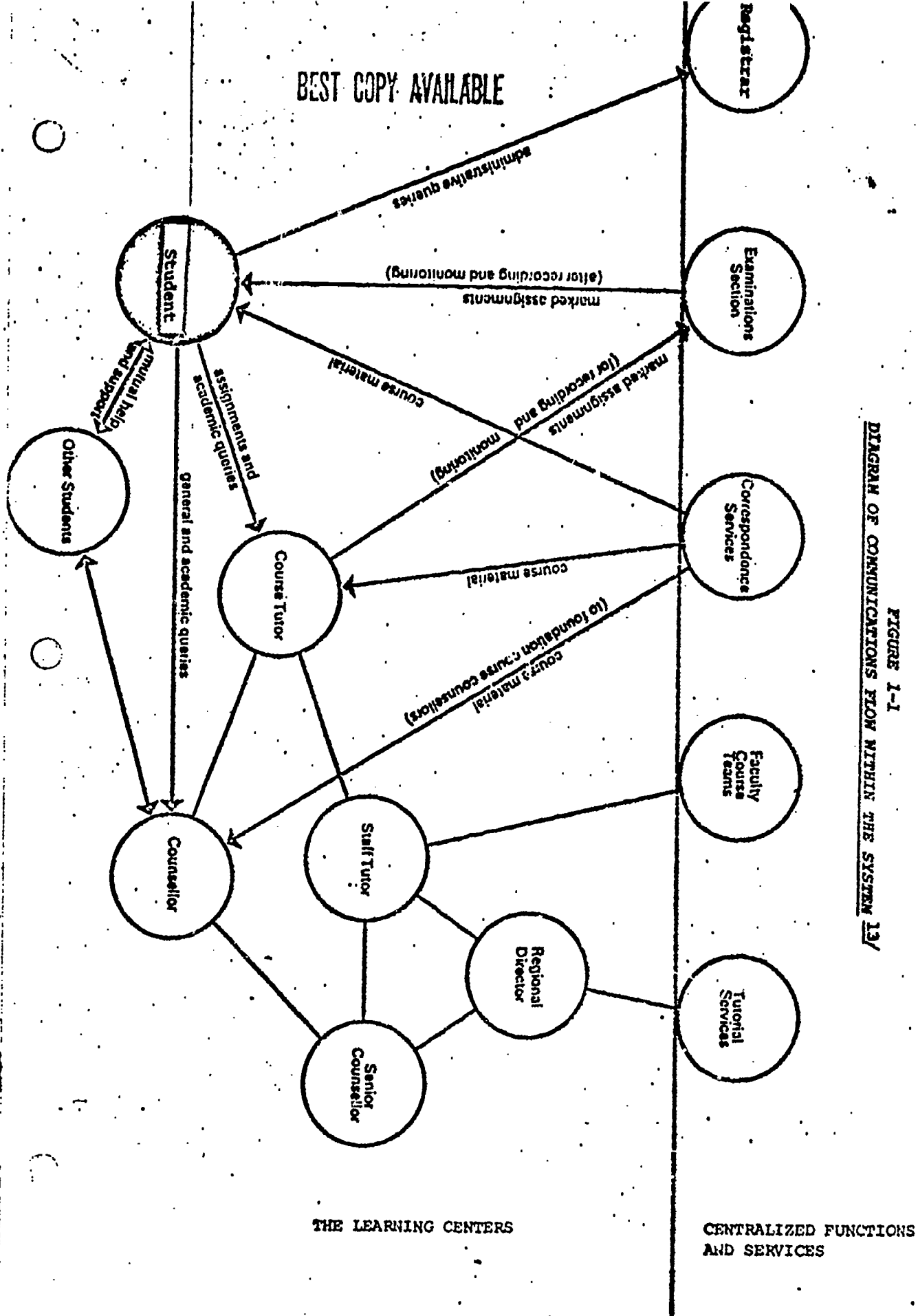
- There is no teaching campus.
- There are no academic barriers to admission. A strong effort has been made to reach blue collar workers, and any man and woman twenty-one years of age or older may enter.
- The teaching system is technologically based. The primary mode of instruction is correspondence material supplemented by a variety of innovative methods such as radio, television, self-assessment tests, one-week residential summer schools, and computer-graded assignments.
- The whole system is managed by computer, including student records maintenance, student billings, and management of the student's academic program.

The information flow within the system is depicted in Figure 1-1 which follows.

There are five components to the Open University teaching system: correspondence material, television programs, radio programs, tutorials at local study centers, and summer schools. The first three items are impersonal; the last two involve direct student-teacher contact. An additional form of student-teacher contact is provided through counsellors who advise the student on any non-academic problems he may encounter.

At regular intervals the student receives a block package of correspondence materials containing written material and, where appropriate, slides, films, records or science kits for home experiments. The written material includes references to other reading, some self-test questions, and a guide to the relevant radio and television programs. The student is given assignments at regular intervals to be graded by a tutor or by a computer.

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From Open University, B.A. Degree Handbook (1973).

This technologically-based delivery system determines the cost structure for the whole program.¹⁴ The expense of the impersonal components is in effect a fixed cost. A television program costs as much to produce for one student as it does for fifty thousand. The only variable element in the correspondence package is the cost of printing and postage, and this is regarded as a variable cost in the University's budget. The ancillary material that might be sent with the packages (slides, records, etc.) is also regarded as a variable cost. Besides these, the only major cost that varies with the number of students is that concerned with the provision of personal tutorial services. Thus, there is a high ratio of fixed to variable costs in contrast to conventional universities, where the largest single item is a variable overhead-academic salaries-because it is directly linked to the number of students.

Direct per student costs are complicated to figure, but can be calculated by working out a cost figure for each item of direct cost in relation to total output. For example, the printing costs of the correspondence element will depend on the number of students; equally, the larger the number taking science, the greater will be the expenditure on the relatively expensive home experimental kits. In any case, the marginal costs of each extra student are relatively small and the average cost per student declines as the number of students increases. As a result, an Open University type system can handle relatively large numbers of students. The University is planning for 38,500 students in 1973, although this figure does not fully exploit the economies of scale that clearly exist in the Open University.

The average capital cost per student place (including land and equipment but excluding residence) at conventional universities is likely to be in the region of \$15,000, depending on the particular site and the proportion of science and technology facilities to arts and humanities facilities.¹⁵

¹⁴See generally, Wagner, Supra, note 12.

¹⁵Wagner, Supra note 12 at 178.

The capital costs of the Open University are given in its budget at 1970 prices, and this expenditure is expected to be its total capital costs in the foreseeable future. This capital cost is presently estimated at \$15,000,000¹⁶. At conventional universities, there is some scope for economies of scale in capital expenditure as a certain proportion of capital costs is independent of the number of students. At the Open University, almost all capital expenditures are independent of the number of students. The main items of capital expenditure, such as site, offices, and curriculum development laboratories, are geared to the number of staff, not the number of students. The major capital item which is dependent on the number of students is the correspondence section, which is in charge of collating, packaging and mailing material to students and which is likely to comprise about 15 percent of total capital costs.

Therefore, the capital cost per student place at the Open University depends crucially on how many student places are allowed. The present figure is 36,500 student places, but many more could be enrolled with only a marginal increase in capital costs. Nevertheless, even with only 36,500 students, the total capital costs of the Open University are expected to be about \$15 million in 1970 prices, producing a capital cost per student place of \$445.00. Thus, the capital cost per student place at the Open University is about six percent of the cost at conventional universities. Moreover, student numbers would have to fall to 2,000 before capital costs per student place became equal to those at conventional universities.

¹⁶ The Open University, Annual Report, 1973.

In discussions with Open University officials and reviews of some of their internal documents, we have estimated the relationship of costs of the Open University in comparison with traditional universities:^{17/}

	<u>Open University</u>	<u>British Traditional Universities</u>
A. Average current cost per equivalent undergraduate	\$ 627.00	\$ 2,350.00
B. Capital cost per student place	\$ 465.00	\$15,000.00

The Open University has also made a comparison between the cost per graduate in conventional universities and the cost per graduate from the Open University. The cost per graduate is in excess of \$12,000 in conventional English universities. To calculate the cost of an Open University graduate involves problematical assumptions about the future total student population and annual number of graduates. We assume that the Government policy on the number of students remains within a range of 36,000 to 42,000. The University has itself assumed that with an eventual stable total student population of 37,500, in the long run, it should be able to offer about 15,000 new places each year. A student population of 37,500 is likely to involve the University in current operating costs of about \$23,087,000.00. There is no reliable information on the number of likely graduates each year. Since the Open University is an innovation, drop-out figures from existing correspondence schools are of little guide. The Open University is much more than a correspondence college; it offers an integrated system of teaching in which television, radio, tutoring, and correspondence all play a part. Nevertheless, assuming first that the total student population is 37,500, involving a recurrent annual cost of about \$23 million, and secondly, that there is an annual student intake of 15,000, then there would have to be an 85 percent drop-out rate before the cost per graduate equals the \$12,000 of traditional universities.

¹⁷ See also, Wagner, Supra Note 12 at 181.

The gap between the Open University and the conventional universities' figures is too large to be ignored, and is unlikely to disappear when ex-post figures become available. The Open University system has a substantial cost advantage over conventional universities, particularly when capital costs are taken into account. Even when an allowance is made for the possible lower research ratio in the Open University's cost, conventional university costs are still significantly greater than those of the Open University.

The Open University's fiscal advantages arise largely from its production techniques. The use of correspondence media, radio and television produces economies of scale which, above a certain minimum number, allow many more students per dollar to be taught.

Traditional universities are both highly capital intensive (because of faculty tenure) and highly vulnerable to shifts in student demand resulting in an enterprise with a high break-even point and inflexible product mix. The British Open University substitutes high capital investment for labor and thus introduces a new form of production. Early evaluation of the British Open University in England indicates that performance of students is comparable to students enrolled in traditional programs. An evaluation by the Educational Testing Service by the use of the British Open University materials at three American Universities; (University of Maryland, University of Houston, and Rutgers), concluded that: 18/

"the British Open University methods and materials are generally appropriate for use in institutions of higher education in the United States and offer a viable alternative for colleges and universities that might be considering non-traditional programs."

In our opinion, the BOU represents a major type of future alternative postsecondary delivery system which incorporates external degree concepts.

18 Hartnett, R., Clark, M.J., Feldmeyer, R.A., Gleber, M.L., and Soss, N.M., The British Open University in the United States adaptation and use at three universities (1974) 95.

Unfortunately, there are major obstacles to its development. The first large scale attempt to introduce the British Open University in this country collapsed because of difficulties with the accreditation associations and state authorities.^{19/} A similar effort being sponsored by several mid-western universities and called the University of Mid-America, is being supported by the National Institute of Education and the Ford Foundation. The University of Mid-America is designed to serve students in a multi-state area, but does not begin to approach in scale the magnitude of the British Open University. Present efforts are limited to programs at the University of Maryland, Rutgers University, and Houston. All three programs are miniscule in scope serving all together less than 1,500 students.

Innovation on the scale of the Open University is unlikely to come forth from the traditional university system. Under present rules, such an institution could not easily operate across state lines and would not easily conform to the criteria and standards of the regional accreditation associations. As a result, it is impossible to raise the necessary capital for the long development period that is required.

3.2.3 The Examining Agency Model

The Examining Agency Model is a third type of external degree program, which deserves to be distinguished because in this model the institution does not provide any instruction.

¹⁹ Interview with Roger Middlekauf, Attorney, Washington, D.C., April, 1974, Notes on file.

The examining agency model has its antecedents in the University of London's external degree²⁰. In 1836, the University of London was established solely to conduct examinations and confer degrees. Although called a University, it was only an administrative body with degree-granting power. Not until 1900 did the University begin to admit students and provide instruction. It presently "enrolls" approximately 35,000 students throughout the world and examinations can be taken at centers in the United Kingdom or overseas. The student pays only modest registration and examination fees. Today the University of London is considered the prototype model for institutions which are designed to separate the instructional function from the assessment function.

An American adaptation of the University of London program is the Regents External Degree Program of the University of the State of New York.²¹ The University of the State of New York, established by the New York State Legislature in 1784, is the oldest state educational agency in the United States. It is governed by the Board of Regents and managed by the Commissioner of Education who serves as its president.

The Board of Regents determines the State's educational policies, incorporates colleges and universities, approves academic programs leading to college degrees, and establishes standards for most professions. The Board of Regents has the unusual distinction of being listed as a nationally recognized accrediting agency by the United States Office of Education.

²¹ See Houle, Supra Note 4 at 12.

²² See generally, Nolan, "The New York Regents External Degree," 85 College Board Review (1972);

In 1970, after almost 200 years of existence, the Board of Regents established the Regents External Degree and shortly thereafter graduated its first students.^{22/}

The Regents External Degree is designed to enable independent students with college level knowledge to earn a degree without attending college. It is awarded by an academic institution which evaluates a student it has not directly taught and which has no campus, resident faculty, or students in a traditional sense. There are no requirements of admission, residence, or age.

Programs are offered leading to the associate in arts, associate in applied science in nursing, and bachelor of science in business administration. A bachelor of arts degree program with majors in many liberal arts areas has begun.

A student may earn credit towards a Regents External Degree in a variety of ways, including: (1) college courses from regionally accredited institutions of higher learning; (2) proficiency examinations; (3) military service school courses; and (4) special assessment of knowledge gained from experience, independent study, or other non-traditional approaches to education.

The Regents External Degree is a radical departure from existing practices. Formal admission requirements are eliminated, a variety of methods are used to assess that learning has taken place, and all learning methods are accepted as valid if they are effective.

²² New York State Board of Education, Regents External Degrees, (1973).

The New York model has already been adopted by the State of New Jersey, and there is evidence that other states may establish similar programs.

3.2.4. The "Rip-off" Model

The "rip-off" model is a convenient category which refers to all those degree programs which pretend to be legitimate external degree programs, but are in fact using the external degree to exploit students, offering little service for a high price. Such programs are akin to "diploma mill" operations. In the most complete study of degree mills ever published, Robert H. Reid estimate that there were at least 200 different degree mills operating in 37 different states.^{23/} In a more recent study, Lee Porter estimates that at least 50 degree mills still existed in 1971.^{24/} The "traditional" degree mills are a classic fraud. Such an institution purports to be accredited, have facilities, faculties, and offer instruction leading to all kinds of degrees up to the doctorate--all for a fee. They typically operate solely by mail, without staff or facilities of any kind other than a desk in the president's home. Porter reports that one degree mill, which awarded doctorates:^{25/}

"had nothing other than a name and its entire campus was a desk in a corner of a real estate office with a secretary who was the faculty and staff."

²³ Reid, R.H., American Degree Mills, (1959).

²⁴ Porter, L., Degrees For Sale (1972)

²⁵ Porter, Supra, note 24 at. 33,34.

If courses are offered the time period is telescoped. Many degree mills advertise that a PhD. can be earned by mail in a matter of months. For example, one can purchase a PhD. from Florida State Christian College for \$350.00 or if a northern state is desired, a PhD. is available from Marlowe University in New Jersey^{26/}

Of course, these degrees have no educational value. None of the institutions are accredited by the regional associations and any careful employer will recognize them as worthless. The Educational Directory of the Office of Education takes a definite position on the value of degree mills^{27/}

In view of the inadequacy and utter worthlessness of degree mills and their disservice to American higher education, the U.S. Office of Education strongly urges the public to be on guard against organizations advertising degrees based solely on correspondence study.

During the last twenty years, federal and state agencies have tried to put the degree mills out of business and there is evidence that they are succeeding. Legislation has been passed in many states which prevents such institutions from operating. Unfortunately, just when it seemed that the degree mill problem was being solved, the "external degree" movement picked up momentum. Descriptions of external degree programs do sound similar to the types of programs described in the catalogs of degree mills. There is a great fear that the degree mill operators will seize on the current interest in the external degree as a way of expanding their operations. More seriously, some accredited, legitimate institutions, desperate for ways of expanding their tuition base may initiate external degree programs without the necessary planning and preparation. The result can be "rip-off" programs that tarnish the whole non-traditional study movement.

²⁶Porter, Supra, note 24 at 2-3.

²⁷Office of Education, Education Directory, Part 3: Higher Education.

The possibility that the external degree movement will be exploited by degree mill operators and administrators of desperate accredited institutions threatened with extinction creates the need for quality control.

3.3 The Need for Quality Control

The rapid growth of the external degree movement has created a nationwide debate among professional academics on the need to control their unfettered growth. There is a great fear that as the distinctions between "legitimate" degrees and "external" degrees becomes vague, the opportunities for fraud and exploitation will become unmanageable. For example, JB Lon Hefferlin in Cut-Rate Credits and Discount Degrees, a report prepared for the Commission on Non-Traditional Study, states:^{28/}

"Unless some distinctions are possible, the entire field of non-traditional study is likely to be as tarred for Americans by the degree mill business as conventional American degrees are already tarred for foreigners, whose more frequent contact with American higher education is with mail-order outlets for \$90 doctorates. ---- No issue hold more long-term significance for the development of non-traditional study than this need for quality control."

²⁸

Hefferlin, JBL, "Avoiding Cut-Rate Credits and Discount Degrees," in Planning Non-Traditional Programs (ed. Cross, Valley & Associates) 151 (1974).

Even the Commission on Non-Traditional Study, the staunchest advocate for the movement, warns that, "Charlatans in our midst are taking advantage of the flexibility of non-traditional education to increase their 'diploma-mill' types of operation."^{29/}

Other cautious observers of the movement include Edward T. Carr of the Division of Higher Education in the New York State Education Department, who has said that, "It's pretty difficult to tell here where the "Charlatanism ends and the integrity begins."^{30/} Lewis B. Maylew, Professor of Education at Stanford, says: "The current interest in external degrees and 'universities without walls' could well be a fad, fraud or romantic fantasy."^{31/} And Felix Robb, Director of the Southern Regional Accreditation Association, cautions,^{32/}

"with the onset of non-traditional study, it is so easy for a charlatan or a crook to set up something that has no campus, has no resources, has no faculty, has nothing but fraud in mind and a mailbox or possibly a hotel room that may be loaded with diplomas, and then operate on that kind of cheap basis. That's outright fraud, and there are cases of exactly that. But up the scale a way, are institutions that have extremely limited resources and a few front names that they've managed to pick up one way or another and so have quasi-legitimate status.

Then you finally get some new institutions that have serious intentions of trying to build an exciting program on a highly different structure than we've been accustomed to. It gets more and more difficult in these gradations and shades of quality to determine what's legitimate and what's not."

The fear underlying the professional academic's demand for "quality control" is that the external degree will devalue traditional degrees. External degrees and other non-traditional forms of studies can be easily made synonymous with reduced standards.

²⁹ Planning Non-Traditional Study Programs, 6 (1974).

³⁰ Article, The New York Times, July 14, 1972, 36.

³¹ Reported in Chronical of Higher Education March 13, 1973. pp.5.

³² Id.

A second fear is that the external degree will become a device for abusing the rights of consumers. Even students at accredited institutions are increasingly facing an array of consumer problems in traditional programs which range from outright fraud, deception, misrepresentation, and false advertising, to ordinary breach of contract by failing to deliver promised educational services. Table 1, which follows, is an inventory of educational consumer concerns collected by the Office of Education. These kinds of consumer complaints could grow in severity as the external degree movement increases in momentum.

Table 1

Inventory of Educational Consumer Concerns

1. Degree mills.
2. Discriminatory refund policies.
3. Misrepresentation in selling, advertising, promotional materials, etc.
4. Abuse of Federal programs of student assistance.
5. Lack of available jobs upon graduation.
6. Non-delivery of item or service contracted for.
7. Lack of provision for due process, appeal concerning injustices, etc.
8. Arbitrariness in administrative policies and procedures.
9. Severe and unwarranted regulation of student conduct, living arrangements, moral behavior, etc.
10. Imposition of non-educational requirements, such as certain religious practices and customs, upon students who do not wish to fulfill them.
11. Unrealistic academic requirements and practices, such as inaccurate grading systems, residence requirements, etc.
12. Imposition of unwarranted and sometimes unspecified fees and other charges.
13. Changing requirements during the life of the student's "contract" with the institution (e.g. changing degree requirements mid-stream).
14. Raising tuition abruptly and without adequate notice.
15. Excessively punitive charges for infractions such as loss of library books, lab equipment breakage, etc.
16. Holding up transcripts, diplomas, etc., for unwarranted reasons.
17. Lateness in obtaining qualified instructors, textbooks, equipment, classrooms, etc.
18. A host of minor frauds, such as: poor food in dining halls, inadequate academic or personal counseling service, inadequate student health service, listing of non-existent faculty and courses in college catalogs, diversion of institutional resources to inter-collegiate athletics and other luxuries, ineffective management of endowment and other assets, forcing faculty to subsidize education through low salaries, etc.

19. Use of outdated or obsolete equipment, textbooks, laboratories, etc.
20. Showing favoritism to individual or certain categories of students (for example, preferred seating arrangements for seniors at football games).
21. Administrative tolerance of outmoded practices such as student hazing, ritualistic destruction of property, etc.
22. Lack of adherence to promulgated standards, procedures, rules, regulations, etc.
23. Unwarranted substitution of contracted items (such as qualified professors, dormitory rooms, etc.)
24. Taking advantage of students because of their social status by using them as cheap labor, regularly requiring them to stand in long lines for registration, etc.
25. Overdoing the in loco parentis concept by direct and illegal interference with individual freedoms and human rights.

Source: Educational Consumer Issues and the U.S. Office of Education, prepared by AIES for use by the Task Force on Educational Consumer Protection, January 26, 1973, Table I.

Consider the following hypothetical case and the consumer issues raised by it.

An out-of-state institution advertises in a foreign jurisdiction to establish a master's degree program in Guidance and Counseling for teachers in elementary and secondary schools. The program consists of 10-12 intensive seminars over a two-year period. There are no residence requirements or admission requirements, except an undergraduate degree. At least 40% of the required degree credit can be earned in alternative ways, such as relevant work experience, employer-based training, or work done at other institutions. The program purports to prepare teachers for careers in guidance and counseling in school systems, and to meet in-service local school system training requirements for in-grade salary increases. A sequence of proposed courses is published, with a concentration in guidance at the Junior High School level. Frequent counseling is promised as part of the program.

Six months after the program has occurred, the following events take place: The on-campus professor responsible for the Junior High School concentration transfers to another institution and the institution can't recruit someone to take his place. The head of the counseling and guidance department then changes the program to a general counseling and guidance major. A small minority group of professors in his department are opposed to off-campus programs, and boycott the out-of-state program refusing to provide counseling services to students. The same minority group of professors veto the selection by the department head of adjunct, part-time faculty. The students, aware of on-campus dissensions begin to drop out of the program until the enrollment falls below the minimum economic level required to break-even. The University, finding a negative cash-flow and loss situation, abruptly ends the program six months later, before any of the students have a chance to graduate. After the program closes, the students learn that the program was never accredited by the State Board of Education and that therefore, credits cannot be counted toward in-grade salary increases, and thus tuition is not reimbursable under state programs. Students trying to transfer their credits to in-state institutions learn that their academic records are no longer in the state, and are inaccessible at an academic institution two thousand miles away.

Students trying to recover their money, learn to their dismay, that since the state did not have a registration procedure for foreign, non-profit corporations, there was no agent to sue; moreover when they complained to their accreditation association, they were told that the University in question was not within their region's jurisdiction and in any case, it was not a consumer rights agency.

This case, as a minimum, raises issues of consumer fraud and breach of contract; misrepresentation in selling and advertising; and failure to deliver services promised. Can the students get tuition refunds? How can they retrieve their academic records? Who has jurisdiction to police the academic institution to prevent the situation from recurring in another state?

Unfortunately, the problems of state negligence, regional inconsistencies, ineffective accreditation association, and consumer fraud in higher education, have existed for some time. The advent of the external degree is exposing the deficiencies of our existing institutions and the ineffectiveness of the present regulatory system.

The task facing policy-makers and legislators is designing a regulatory framework which provides equitable remedies for students exploited by allegedly non-traditional educational programs, while permitting genuine innovative alternatives such as the Open University to develop. Unless a more effective regulatory framework is created which gives legitimacy to the external degree movement the most important new innovations in higher education in a century will be drowned by the attacks of conservative academics with a vested interest in existing educational practice. The substandard external degree program operated by an accredited institution is the biggest threat to the external degree movement, for it will provide additional ammunition to those who would resist change. The remainder of this study explores the possibilities for such a framework and analyzes the roles and limitations of the states, the accreditation associations, and the federal government.

4.0 THE ROLE OF THE STATES

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4.0 THE ROLE OF THE STATES

4.1. State Regulation of Higher Education

4.1.1 Introduction

There is little uniformity in state responses to higher education. State statutory schemes vary from absence of any mention of higher education to far-reaching legislation that assumes vast powers over higher education. Nevertheless, in general it is the case that nonprofit, non-vocational, regionally accredited institutions of higher education are often free of any significant regulation.

Innovative programs, including the external degree and programs that cross state boundaries, are almost never mentioned in state statutes. We have attempted to determine, from an examination of state statutes; from analysis of those few state regulations available to us; and correspondence and conversation with state educational authorities, the approach of the states to the regulation of external degree programs.

4.1.2 Regulatory Patterns

State authority over higher education is commonly asserted at the time of incorporation, or at the time a school begins to operate, grant degrees, or use collegiate names.

Regulation at the time of incorporation ranges from routine incorporation provisions that apply to every type of nonprofit corporation to substantive educational criteria that must be met to the satisfaction either of a special educational board or the regular corporation authority. These incorporation regulations are summarized in Volume II, Appendix A.

State regulation also takes the form of regulation applied as a condition of operation, degree-granting or use of a collegiate name. Typically, these regulatory schemes delegate responsibility for formulating standards to an educational board. The few requirements that are contained in the statutes concern such diverse subjects as registration, bond requirements, licensure

of agents, financial resources, character of applicants, qualifications of faculty and physical resources. These licensing schemes also frequently contain penalties and less frequently, procedures for withdrawal of permits. Many state schemes which do contain developed plans for regulation are notable for their practice of exempting schools which are accredited institutions. At least twenty states exempt accredited institutions of higher education from state regulations.^{1/} The exemption is worded in a variety of ways: "Accredited by accrediting agency recognized by state;"^{2/} "accredited by regional accrediting agency;"^{3/} approved by Northwestern Association of Secondary and Higher Schools;"^{4/} "accredited and permitted to award degrees by state in which campus is located;"^{5/} "accredited by accrediting agency recognized by U.S. Office of Education;"^{6/} "which offer credits transferrable to schools accredited by accrediting agency recognized by U.S. Office of Education;"^{7/} or just "accredited"^{8/} without specifying by whom.

For example, the state of Florida has established a detailed regulatory scheme for nonpublic colleges,^{9/} which provides for a strong enforcement agency known as the State Board of Independent Colleges and Universities. Unfortunately, excluded from the licensing and regulation requirements of the chapter are:^{10/}

"(c) Colleges accredited by an accrediting agency recognized by the United States Office of Education or the state board of education."

¹ Alabama (T.52, §644(i) and (k); Alaska (§14.47. 130); Arizona; Florida (246.021(1)(c)); Georgia (32-2304(b)(g)); Idaho (33-2402(3)); Kansas (§72-4920(f)); Maryland (Art.77, §146); Mississippi (§75-60-5(f)); Nevada (§394.200(f)); New Mexico (§73-41-3); Oklahoma (T.70, §4103); Oregon (§351.710); Pennsylvania (T.24, §2732); Rhode Island (§16-50-3); South Carolina (§21-743(b)); Vermont (Title 16, §174, Section (c)); Virginia (§22-330-18); West Virginia (§18-26-13a); Wisconsin (§38.51(a)).

² Idaho, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.

³ Oklahoma

⁴ Oregon

⁵ Virginia

⁶ Alabama, Florida, Nevada, New Mexico, and South Carolina

⁷ Kansas

⁸ Maryland; Mississippi

⁹ Chap. 246, Florida Statutes, See generally, Rules and Regulations of Florida, State Board of Independent Colleges and Universities, Chapter 6A-13, 1972-73.

¹⁰ Chap. 246 Section 246.021(1)(c).

Similarly, the regulatory scheme in the state of Vermont provides that:"

"This section shall not apply to an institution of higher education operating in Vermont but chartered in another state and accredited by the state applicable regional accrediting agency recognized by the state board...

This pattern of reliance on the decisions of private groups is of critical importance, because it means that in many cases an institution is totally free of state supervision once it achieves accreditation.

4.1.3 Foreign Schools

Many external degree programs and other forms of innovative education have substantial operations in states other than the state of their original incorporation, or than the state where degree-granting authority was first procured.

The effect of a state's regulatory scheme on a foreign school is unclear. Existing statutes are usually designed for state domiciled schools. Few statutes mention foreign schools, and they often do so in a correspondence-vocational school context that does not include most liberal arts institutions. It is frequently difficult to determine whether a statute is intended to be applied to a foreign school. Thus, it was unclear whether a Massachusetts statute which regulated the granting of degrees should be interpreted to apply to an out-of-state school which has a branch in Massachusetts, when the classes and students were in Massachusetts, but the degree came from the out-of-state campus. Chapter 69, Section 31A of the Massachusetts General laws provide that:^{12/}

"No educational institution located within the commonwealth shall award degrees unless authorized to do so by the commonwealth."

¹¹ Title 16, §174 Postsecondary educational institutions; degrees, name, Section (c).

¹² General laws of Massachusetts, Chapter 69, Section 31A, (1964,66).

The out-of-state institution argued that since it wasn't located within the state it was not subject to degree regulation by the commonwealth. To compound the confusion different states interpret similar statutory language differently, and information about these interpretations is difficult to obtain.

State statutes which require foreign corporations (corporations which are domiciled in another state) to register with a local corporation authority are another form of state regulation with a potential effect on innovative education. The registration requirement is an important method of gathering information about corporations doing business in the state, and of providing convenience in litigation against foreign corporations.

Appendix B provides a detailed account of the statutory provisions that apply to foreign corporations in each state.

4.1.4 Innovative Education

As part of our statutory search we attempted to determine which states had requirements which might have a restraining effect if applied to innovative education.

Vagueness and lack of specificity emerged as the most prominent characteristic of state statutes and regulations. A requirement that a school have "adequate facilities" could be interpreted in such a manner as to bar many innovative programs from operation, or could be interpreted in a manner sympathetic to the special aspects of innovative education. Because the administrative interpretations are so frequently unwritten one can conclude that the uncertainty of what to expect from a state board alone can exert a significant effect on the development of innovative education in a state. Although state statutes generally avoid specificity, when specific criteria are established they are generally insensitive to the problems presented by external degree programs, and in some cases could have a restraining effect on external degree programs if enforced. Minimum residence requirements for degrees present the most striking example of state regulation which stifles innovation. For example, the state of Arkansas requires that:^{13/}

"No educational institution shall confer degrees upon students for mere correspondence courses, or upon any student who has not studied in residence for one (1) scholastic year.

Because of this provision a British Open University type program could not be operated in Arkansas.

¹³ Arkansas Statutes 64-1408.

Statutes which fix minimum endowments as prerequisites to operation could conceivably hamper innovative programs, especially when programs operate in many states, and must meet maximum standards in each state. An example of such a provision is that Pennsylvania requires that:^{14/}

"A minimum protective endowment of at least five hundred thousand dollars (\$500,000), beyond all indebtedness and assets invested in buildings and apparatus for the exclusive purpose of promoting institution."

This provision has already been used to exclude a nation-wide program from operating in the state of Pennsylvania because \$500,000 of liquid assets were not on deposit within the state--a clearly unreasonable burden.^{15/} Faculty requirements, such as requirements that a school "[h]ave at least eight regular professors who devote all their time to the instruction of its college or university classes..."^{16/} or a requirement that 75% of the faculty be full-time preclude the operation of many non-traditional models.^{17/} Credit hour requirements for degrees commit states to traditional measures of learning.^{18/} Finally, requirements like that of Nevada,^{19/} that schools teach one year of constitutional law and history, but not reach any subject except a foreign language in a language other than English, testify to the basic obsolescence of most state attempts at quality control.

4.1.5 Conclusion

The attitude manifested by most state statutes towards innovative education is at present one of indifference. Of those states which do in some manner supervise private higher education the majority exempt accredited schools, thus leaving whatever regulation that is to be done to a private group. In those states where statutory provisions exist for the regulation of private higher education, special provisions for innovative education are rare.

¹⁴ College and University Standards Law, Act of May 7, 1937, P.L. 585, Section 312(1).

¹⁵ See discussion pp. 4-6; 4-10.

¹⁶ Pennsylvania College and University Standards Law, Act of May 7, 1937, P.L. 585, Section 312(2).

¹⁷ Oregon Application Procedures and Standards for Approving Institutions for Degree Granting Authority; OLS 351.710 to 351.760 and OLS 351.990.

¹⁸ Committee for Higher Education, "Policies and Procedures for Licensing and Accrediting Institutions of Higher Learning in Connecticut," Section 10-330-18(c) (1970). See also Analysis of Virginia in Appendix A.

¹⁹ Nevada Revised Statutes, 394.140, 394.150.

4.2 State Response to External Degree Programs

4.2.1. In General

In general, state regulation of higher education is weak, uncoordinated, and ineffective. Although there are several notable exceptions, such as New York, New Jersey, Massachusetts, Pennsylvania, and California, the majority of states have statutory schemes which have so many loopholes that violators can operate with impunity. As George Arnstein has pointed out, "it is easy to demonstrate that they are not working because if they were working, and if they were effectively enforced; then we would have no abuses because every offending school would be out of business...by having its state license revoked or suspended."¹ Foreign institutions offering external degrees complicate the situation and strain the existing legal and administrative machinery. Our field research (See Appendix A) revealed that very few states have promulgated regulations which specifically apply to foreign regionally-accredited degree granting institutions. J.B. Lon Hefferlin, in his report for the Commission on Non-Traditional Study, concludes that state regulation has had little influence on the development of external degree programs, and that "so far state regulation appears not to have seriously retarded the development of unconventional education."² Hefferlin's report was prepared in September, 1972. Since then it has been noted that there is increasing concern among state officials that academic institutions from other states will erode the established market enjoyed by their own in-state institutions.

The paradox is that while some states have no regulatory schemes other states have adopted irrelevant and restrictive criteria, such as residency requirements, length of programs, restrictions on curriculum, and restrictions on credit, which are being used to thwart external degree programs, particularly those operated by out-of-state institutions.

¹ Testimony by George E. Arnstein, Before the Special Investigation Subcommittee of the Committee on Government Operations, House of Representatives, July 16, 1974, 3 manuscript notice.

² Hefferlin, J.B.L., "Avoiding Cut-rate Credits and Discount Degrees," in Planning Non-Traditional Programs 155 (1974).

We did not survey state officials to determine their attitude towards non-traditional study programs, for that was beyond the scope of the original study design, but contacts with state regulatory agencies revealed a growing skepticism towards innovative programs. Discussions with selected leaders in the external degree movement confirmed these indications that states are taking a much tougher stance towards the new programs.^{3/}

To illustrate the nature of the opposition and to provide a basis for legal analysis, we present two concrete cases of conflicts between academic institutions and state officials: The experience of University of Northern Colorado, a public, accredited institution operating in the state of Pennsylvania; and the case of Antioch College, a private, accredited institution domiciled in Yellow Springs, Ohio operating in the state of New York.

4.2.2 University of Northern Colorado in Pennsylvania ^{4/}

In 1970, the University of Northern Colorado entered into a contract with the Pennsylvania Department of Community Affairs, a state agency, to provide instruction to local government employees in new town community development. The University had developed an innovative, nation-wide program, in consultation with the Office of New Communities Development of the U.S. Department of Housing and Urban Development, which was designed to bring to local government employees and local developers the latest advances in the art of developing new towns. The faculty consisted of nationally known experts in land planning, new town finance, architecture, social planning, and government, who together had designed an integrated curriculum which lead to an Masters of Arts (M.A.) in New Communities Development. The instruction format was a series of intensive seminars taught by this national faculty at various locations throughout the country. Approximately

³ Dr. Stephen Plummer, formerly Dean, Special Programs, Antioch College; Dr. Jules Pagano, Florida International University.

⁴ The facts in this case example were provided by Dr. Barbara Mickey, Academic Vice-President University of Northern Colorado.

400 students were enrolled in the program nation-wide. The Pennsylvania program was designed for fully-employed government professionals who held various responsibilities in community development in state and local government departments in Pennsylvania. The State Department of Community Affairs had received funds from the U.S. Department of Housing and Urban Development under Title VIII of the Housing and Urban Development Act of 1968 and with this resource, they contracted with the University of Northern Colorado to provide training in New Communities development for approximately 60 local government employees. The funds were used to pay for tuition and fees.

When local universities in Philadelphia, such as Temple and University of Pennsylvania, learned that the State Department of Community Affairs had contracted with an out-of-state university, they were outraged. They complained to the Pennsylvania Department of Education and shortly thereafter, UNC received a letter from the state requiring them to comply with regulations issued by the Secretary of Education, or cease work on the contract already entered into with the Pennsylvania Department of Community Development.

Pennsylvania is one of the states that has a comprehensive statutory scheme. Article IX, as amended, states in part:^{5/}

"The Department of State shall not issue a certificate of an authority to any foreign nonprofit corporation...
(4) If the corporation is a college, university, theological seminary or other nonprofit corporation which, if formed under the provisions of this act, would require the approval of the Secretary of Education....
Whenever the Department of State shall receive an application for the certificate of authority from this corporation, it shall be the duty of the department to submit the application to the Secretary of Education and thereafter the procedure shall be the same as that heretofore prescribed by this act for the approval or disapproval of applications for the

⁵ Article IX, Section 902, Act of May 5, 1933, P.L. 289, (15 P.S. §7902).

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incorporation of similar domestic nonprofit corporations... It will be unlawful for the Department of State to issue a certificate of authority to such a corporation without the approval of the Secretary."

Essentially this means that foreign corporations must meet the same standards as those applied to domestic corporations.

The requirements of the Secretary of Education are stringent. Under the statute a degree granting institution must have a minimum protective endowment, of at least \$500,000 beyond all indebtedness and assets invested in buildings and apparatus, for the exclusive purpose of promoting instruction. It must also have a faculty consisting of at least eight regular professors who devote all their time to instruction of college or university classes, or if the college is devoted to a specific subject in art, archaeology, literature or science at least three regular professors.

The standards prescribed by the Secretary of Education pursuant to a "Special Procedure for Incorporation of Educational Institutions Desiring to Confer Degrees,"⁶ must also be met.

The standards include:

1. Establishment of the extent of need for the institution through an extensive survey by use of techniques and procedures acceptable to the Secretary of Education;
2. The "university" must consist of three units, at the minimum:
 - one unit must provide for the study of the arts and sciences at the undergraduate level (institutions offering only graduate programs may be exempted from this level upon the special recommendations of the Secretary of Education).

⁶ 15 P.S. §7211, 15 P.S. §7312.

- one unit must provide for programs at the graduate level in such fields as architecture, business, administration, education, engineering, health sciences, law, and social work "but not limited to these." Plans to offer doctoral programs in the existing curriculum must be at least formulated.

In addition, a collegiate institution which seeks to be incorporated as a university "shall have had the status of regional accreditation as a college on the basis of initial accreditation and revisitation."

3. The institution must submit a detailed statement of its philosophy. The statement of goals must set forth what the institution regards as its long range mission and a statement of objectives must express specific means for accomplishing the mission.
4. The institution's board of trustees must have as its main function the legal operation of the institution.
5. "The administrative organization [must] reflect the relationships of constituent groups."
6. "Financial records [must] be maintained which are consistent with the record keeping systems of recognized quality institutions of higher education of a similar nature."
7. The undergraduate college, or colleges, of the institution must meet the standards prescribed for the undergraduate colleges.
8. An academic year must consist of class sessions for a period of at least thirty full weeks or its equivalent, exclusive of registration, examinations and holidays.
9. "A private organization or corporation desiring approval for university status [must] submit a formal application to the Secretary of Education... prior to a visitation to the institution. This application shall be filed one year or longer in advance of the time when operation as a university is desired." (Emphasis added.)

State representatives, obviously under pressure from local universities, indicated that UNC would not qualify under a literal interpretation of the guidelines, particularly, guideline eight (8) which requires that an academic year must consist of "class sessions for a period of at least thirty full weeks or its equivalent." Furthermore, many of the standards were originally designed to regulate new institutions which intended to establish traditional residential campuses within the state of Pennsylvania.

UNC, concluding that the cost of preparing a full application for approval would be prohibitive given the small size of the Pennsylvania program, decided to withdraw from the state. Ironically, local universities never began a similar program to fill the evident need, and most of the employees who participated completed their degree programs by commuting to a UNC center in Washington, D.C.

Thus, an out-of-state institution seeking to deliver a small, innovative graduate program to a select number of students for a limited time, were intimidated into closing their program because of heavy-handed bureaucratic regulation and self-serving local academic institutions purporting to act in the public interest.

4.2.3 Antioch College in New York

The Regents of the University of the State of New York is the oldest of the state regulatory bodies. It administers one of the most comprehensive systems of regulation and accreditation of any of the other states. Section 216 of the N.Y. Education Law grants power to the Board of Regents to prevent any higher education institution from operating a program without their consent. The Regents have power to grant absolute and provisional charters to academic institutions and such charters will not be awarded, unless:

"(a) in the judgement of the Regents such an institution possesses resources and equipment available for its use and support, and sufficient and suitable for its chartered purposes, and maintains an organization of usefulness and character satisfactory to the Regents, and

(b) ...the institution has submitted evidence in writing which, in the judgement of the Regents, makes it appear likely that the institution will be successful in achieving registration of its academic programs." ^{7/}

The Regents have the power to incorporate educational institutions, and to give consent to the incorporation of educational institutions under the non-for-profit corporation law. Institutions not chartered by the Regents may not grant degrees or "use, advertise, or transact business under the name, university or college." ^{8/}

Foreign "education corporations" are those which are "formed under laws other than the statute of this state, which, if it were to be formed currently under the laws of this state might be chartered by the Regents." ^{9/} Foreign educational institutions may be:

"(a) ... granted authority to conduct activities in this state by the Regents pursuant to this section and subject to such provisions, not inconsistent with this section, as the Regents may prescribe, or

(b) under the consent of the Commissioner, may receive authority under Article 13 (Foreign Corporations) of the non-for-profit corporation." ^{10/}

⁷ N.Y. Education Law, Section 216..

⁸ N.Y. Education Law, Section 224.

⁹ N.Y. Education Law, Section 216(A) (1).

¹⁰ Id.

Detailed regulations have become promulgated to implement the Regents' statutory mandate and these regulations are administered by the State Education Department. The State Education Department has administrative power to recommend the chartering of educational institutions, to conduct accreditation of these institutions on a five-year cycle, to approve new subject matter and degree programs, and to recommend disapproval if an institution's program plan is not consistent with the Regents' Statewide Plan for the Development of Higher Education, or if it does not satisfy any documented academic need.

In September, 1972, the State Education Department issued detailed guidelines for out-of-state institutions operating educational programs in New York State. External degree programs operated by out-of-state institutions raised two kinds of issues for the State Education Department:

- *(1) the evaluation and administrative review of programs of higher education offered within the State to residents in accordance with Education Law and (2) the impact of these activities on New York colleges and universities in accordance with the Regents' Statewide Plan for the Development of Higher Education.¹¹

The guidelines require that out-of-state institutions of higher education seeking to operate in New York must secure the prior consent of the Regents in accordance with Section 22 of the Education Law, unless they formally affiliate with a New York institution of higher education which has been chartered by the Regents. Failure to secure prior consent constitutes a misdemeanor. The Regents may deny approval to an unaffiliated out-of-state institution if:

- (a) evidence is not offered that the educational quality and resources are equivalent to that of New York colleges and universities. This evidence may take such forms as accreditation of the institution by a nationally recognized, regional or specialized, accrediting agency, or other evidence acceptable to the Department, e.g., the result of an on-site evaluation by Department staff at the expense of the petitioning institution.

¹¹ Guidelines for Out-of-State Institutions Operating Educational Programs in New York State, State Education Department, The University of the State of New York, September 1, 1972.

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(b) or the institution does not: "offer evidence of need and resources for its proposed program;" (c) or its long-range plans are not in accordance with the Statewide Plan for the Development of Higher Education.^{12/}

Special approval by the Regents is not necessary in the cases of programs operated by consortia of which New York higher institutions are members, so long as the New York institution has its own registered programs and has filed a declaration of academic need and responsibility for the program. If the New York institution has not filed a statement of academic need and responsibility it will be assumed that the New York institution is not responsible for the academic quality of the out-of-state institution and the procedures noted above will apply.

Finally Section 3.55 prevents any individual, association, co-partnership or corporation in New York which is not chartered by the Regents from offering a program leading to a degree to be conferred by an institution within or outside of New York State which is not accredited for degree purposes by an accrediting agency recognized by the United States Office of Education.

Approximately five years ago Antioch College, a private institution incorporated in Ohio, began offering external degrees at various centers away from its main campus in different parts of the country.^{13/} An offshoot of these early efforts has been the establishment of the Union for Experimental Colleges, a network of autonomous colleges which together comprise the University Without Walls program described in Part I of this report. The Union has become separately incorporated and has received its own institutional accreditation. A second result of this early innovation has been the establishment of the Antioch Network. The Antioch Network was conceived as a national

¹²

Id.

¹³

The facts for this case were provided by Dr. Morris Keeton, Provost, Antioch College.

program of individual educational centers, each providing a different education experience in a different part of the country, which would be independent of the Antioch physical campus, but dependent on a central administration for support and financing. A student might never set foot on the Yellow Springs Ohio campus. Each center in the network is monitored by an elaborate academic audit system which would assure quality control.

Still in the development phase, the Antioch Network was conceived as a new kind of national educational institution which could provide framework for learning and assessment for students in a variety of different contexts and in a variety of locations. The Antioch Network was designed to provide a framework for a variety of learning experiences in a single institutional setting, while incorporating the best innovations of the newer concepts being developed in non-traditional education, e.g., credit for life experience, competency-based learning, the mechanism of the student contract, etc.

As part of this network, Antioch is currently operating four degree programs in New York State, the first of which began activity in late 1969.

These programs consist of:

1. A B.A. program for physicians' associates, in collaboration with Harlem Hospital Center and Columbia University Colleges of Physicians and Nurses.

This program is a 24-month or longer baccalaureate program for persons with experiences as nurses or medical corpsmen to prepare as physicians' associates. It is designed as an intensive opportunity for career advance-

ment for nonprofessional health workers from minority communities who have demonstrated superior job performance and potential for careers in the human services. The program has recently been accredited by the Council on Medical Education of the AMA, and the first class of five candidates was graduated in December of 1973.

The program is an unprecedented effort in New York State to improve the health of the Central Harlem Community through education and career development.

2. A B.S. degree program in education and community development in collaboration with a local nonprofit corporation known as The Teachers Incorporated (TTI).

This program offers paraprofessionals working in inner city schools and day care centers an opportunity to achieve a B.A. degree under the aegis of Antioch College. TTI staff serve as mentors, tutors, and faculty. They are supplemented by additional faculty resources recruited from other academic institutions.

3. A Masters in Education degree program in early childhood education operated through TTI. This program serves full-time teachers and depends upon a part-time faculty which have been drawn in part from such institutions as Bank Street College and New York University.

4. A Masters of Arts degree in media studies. This is a new program which is designed for fully-employed professionals who want post-baccalaureate work in media studies. The New York center is linked to a comparable center

in the Washington-Baltimore area and represents one of the major functional capabilities of the Antioch network. In addition to drawing upon local resources, some faculty among the two centers are shared, and the program receives central administrative support from Yellow Springs. This program has received separate accreditation from a North Central team.

All four programs presently enroll approximately 400 students. The programs have a number of common characteristics. They serve primarily students who live in New York, although students who live in neighboring states are eligible for participation, and students in other parts of the Antioch network may be admitted. All degrees are awarded by the Yellow Springs campus. Faculty from the whole Antioch network participate with local faculty in instructional and evaluation roles, and provide technical assistance to the individual programs.

Antioch had begun operating in New York prior to the issuance of the September, 1972 Department of Education Guidelines for out-of-state institutions. The Department of Education recommended that Antioch seek separate incorporation as a New York institution with a separate charter from the New York State Board of Regents. Antioch promptly filed the necessary papers. The New York Board of Regents granted a limited "permission-to-operate," pending the outcome of the decision on whether to grant a charter to Antioch-New York.

The State Education Department proceeded to make site visits, and to evaluate the Antioch program. On March 27, 1974, they completed their staff report to the New York Board of Regents. The staff's recommendation was that:

1. "The charter petition be denied on the basis that the need for another institution does not exist and that existing programs can, over a period of time, be assimilated by existing institutions." ^{14/}
2. "The "permission-to-operate" status for Antioch College be continued for all programs other than the B.S. in elementary education which can be assimilated by Mercy College, "a local institution. "Department staff will (1) work with the programs to correct major weaknesses, and (2) continue to investigate the possible linkages of these programs with existing institutions."

The rationale and discussion developed by the staff to justify its recommendations stressed the following facts: ^{15/}

- The programs lacked adequate physical facilities, library facilities, the "collegial experience of a more broadly-based and longer-experienced faculty", and on-site administrative direction and support.
- Part-time faculty raises serious "questions about advisement, collegiality, continuity, and rigor."
- Antioch's central role in maintaining standards of quality is vague, and therefore it, "is questionable whether an out-of-state, necessarily geographically remote institution can, or is likely to be even inclined to, provide the faculty and administrative attention and continuous monitoring necessary to ensure a sound academic enterprise with promise of coherence, permanence, and service to the people of New York."
- There is "little demonstrable need for a new institution when one considers space available in existing well-established institutions."
- The staff indicated that there was great excess capacity among New York state institutions and reported that data showed that an additional 16,132 and 8,693 graduate students could be accommodated by the 23 institutions operating in New York City.
- Antioch seemed to be in a weak financial condition because it has been experiencing operational losses since 1969.

The opinion letter indicated that Antioch should be permitted to operate its programs for a limited time only, until they can be affiliated with local institutions.

¹⁴ Letter to Dr. Morris Keeton, Provost, Antioch College, from N.Y. State Department of Education, March 27, 1974, on file.

¹⁵ Id.

A written response, dated April 30, 1974, was submitted by Antioch to the Regents and a request made to be present at the Regent's meeting of May 22, 1974, when a decision would be made on the recommendation submitted by the State Department of Education.

The major points argued by Morris Keeton, Provost of Antioch, in the written brief and orally before the Board of Regents were that:

1. "The need for the Antioch programs had been acknowledged by the staff report of the State Department of Education, by the Regional Coordinating Council, and by the evidence of demand from enrolled and prospective students. Despite extensive and systematic efforts to find a New York City institution to sponsor the programs, none could be found. Equating "spaces available" in existing chartered institutions with the "lack of need" for an innovative institution such as Antioch is a fundamental error because the spaces are not equivalent. It would be analogous to federal government spending to an "over supply of limousines by measures restricting the production of new, small, sturdy, strong, and highly maneuverable vehicles which are economical for their users. Such action would be comparable to changing Antioch's charter because more conventional programs are not filling their quotas."

"The academic soundness of the programs is not in dispute as acknowledged by the professional staff charged with the investigation."

"Antioch provides significant financial and program support to the New York programs, and the investigating staff failed to report or overlooked significant facts which would affect a decision on Antioch's financial stability."^{16/}

On Friday, May 24, 1974, it was announced by the New York State Department of Education in a press release the decision by the Board of Regents, denied Antioch's request for a charter and granted permission to operate in the state for one year only, until local "program sponsors" could be found. The press release simply stated that "the need for another institution does not exist and that the four programs can be absorbed by existing institutions" and that "Antioch's role in maintaining standards of quality as 'vague.'"

¹⁶

Submission by Antioch College to New York State Board of Regents (1974).

On June 28, 1974, more than a month later, Antioch was notified of the Board of Regents decision in a formal letter from T. Edward Hollander, Deputy Commissioner for Higher and Professional Education to Morris Keaton. The letter consisting of a single paragraph simply stated:

"In the judgement of the Regents, there is no need at this time in New York for an institution with the limited and specialized mission envisioned for Antioch-New York. The Regents have further concluded that the evidence of financial uncertainties shown on the reports furnished to us by Antioch College makes unacceptable the proposed method for ensuring the financial stability of Antioch-New York."¹⁷

The Antioch case dramatizes a number of important issues which will continue to arise as states seek greater control over non-traditional education:

- Can a state exclude a foreign academic institution solely on the ground that in-state academic institutions have vacancies?
- what are the limits of state power to regulate foreign academic institutions?
- what are the limits of state power to regulate resident academic institutions?
- What procedural requirements must be observed by states in regulating academic institutions, both resident and foreign?

The next section analyzes the legal restraints on state regulation of external degree programs and provides a framework for answering these important questions.

¹⁷ Letter from T. Edward Hollander, Deputy Commissioner for Higher and Professional Education to Dr. Morris T. Keaton, Provost, Antioch College, June 28, 1974, on file.

4.3 Legal Restraints on State Regulation of External Degree Programs: "The Commerce Clause"

Activities in "interstate commerce" constitute a well-known exception to state "doing business" statutes. It is well settled that a corporation of one state may go into another without obtaining the latter's permission if its activities are restricted to those in interstate commerce, and any statute of the latter state which obstructs or burdens the exercise of this privilege is void under the commerce clause of the U.S. Constitution.

The most significant external degree programs, such as the UMW consortium and Antioch College, and multi-state open-university type programs all operate across state lines. State legislators and education officials trying to control the quality of such programs must therefore be sensitive to the requirements of the commerce clause as they seek to regulate enterprises which are increasingly becoming national in scope.

The commerce clause in the United States Constitution grants Congress power "to regulate commerce...among the several States..."^{1/} As construed by the courts this language gives the Federal government very extensive authority to regulate, and to preempt state regulation of, activities in or affecting interstate commerce,^{2/} including higher education activities.^{3/} The major questions under the commerce clause today do not concern this clear Federal authority but rather the authority of the States, in the absence of federal action, to regulate activities in or affecting interstate commerce. To what extent does the commerce clause act as an implied, self-executing bar to state regulation of matters falling within the clause's scope but not regulated by Congress?^{4/}

¹Art. I, §8, #3. The full text provides that:

The Congress shall have power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;...

See generally Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Schwartz, Constitutional Law ch. 4 (1972).

² See, e.g., Perez v. United States, 402 U.S. 146 (1971); Katzenbach v. McClung, 379 U.S. 294 (1964). As to preemption, see, e.g., Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

³ See Maryland v. Wirtz, 392 U.S. 183 (1968); Cornell University, 183 NLRB No. 41, 74 LRRM 1269 (1970).

⁴ See generally Dowling, "Interstate Commerce and State Power," 27 VA. L. Rev. 1 (1940); Sholley, "The Negative Implications of the Commerce Clause," 3 U. Chi. L. Rev. 556 (1936).

4.3.1 Higher Education as "Interstate" Commerce

State regulation of higher education will be subject to commerce clause restrictions only to the extent that higher education activities can be characterized as "interstate" (as opposed to "intrastate") within the meaning of the clause. "Interstate commerce" is a comprehensive term. It encompasses "all commercial intercourse between different states and all component parts of that intercourse."^{5/} It includes the movement of persons and goods as well as information and ideas.^{6/} It is not limited to proprietary or business activities.^{7/}

Education activities have specifically been considered as "commerce" within the clause's contemplation. In International Textbook Co. v. Figg,^{8/} a Pennsylvania corporation which operated several correspondence schools, sued one of its Kansas students for the balance due on a course of instruction in commercial law. The question was whether the action could be maintained in a Kansas court even though the plaintiff had failed to comply with various provisions of Kansas' foreign corporation statute. The Supreme Court held that plaintiff's business "was, in its essential characteristics, commerce among the States"^{9/} which would be unconstitutionally burdened if subjected to Kansas' registration requirements. The interstate characteristics of the correspondence school were described to be the:

regular and, practically, continuous intercourse between the Textbook Company, located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode--looking at the contracts between the Textbook Company and its scholars--involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction.^{10/}

⁵ Dahne-Walker Co. v. Bondurant, 257 U.S. 282, 290-91 (1921).

⁶ Furst v. Brewster, 282 U.S. 493, 497-98 (1931); Western Union Tel. Co. v. Pendleton, 122 U.S. 347, 356 (1837).

⁷ Edwards v. California, 314 U.S. 160 (1941); Caminetti v. U.S., 242 U.S. 470, 484-45, 491-92 (1917).

⁸ 217 U.S. 91 (1910).

⁹ Id. at 106.

¹⁰ Id.

Many of the current and projected innovations in higher education would rather clearly shade into this general conception of interstate commerce, e.g. programs relying wholly or partly upon interstate mails, radio or television communications, computer hook-ups, or transient instructors; colleges with branch campuses in more than one state, where there are patterns of interaction between the campuses; colleges or programs "without walls" whose students and personnel engage in educational activities in an interstate context. More localized operations with more firmly established physical locations may also shade into the interstate category to the extent they solicit consumers (students) in an interstate market, have a student body which commutes to and from other states on a periodic basis; have cooperative instructional agreements or pooling-of-resources agreements with schools in other states; or have business and management operations (e.g. alumni offices, recruiting or guidance centers, management consultant services) dispersed interstate.

Most such institutions and programs, of course, are not likely to be considered by the courts as purely interstate.^{11/} The problem is not simply one of determining whether education is, or takes place "in", interstate commerce. Higher education today is a diverse mixture of interstate and intrastate operations and transactions, and it is important under the commerce clause to separate the interstate from the intrastate aspects of each regulated institution or program. While this may be difficult in the abstract, it is usually manageable in concrete cases.^{12/} If the predominant portion of the regulated institution's activities can be characterized as interstate, or if the particular activity or transaction being regulated is interstate, the commerce clause poses a potential limitation on the state's regulatory power.

^{11/}

Cf. International Textbook Co. v. Pigg, supra.

^{12/}

See, e.g., Eli Lilly & Co. v. Sav-On Drugs, 366 U.S. 276 (1961), where the Supreme Court distinguished between the intrastate and the interstate activities of a foreign corporation engaged in interstate commerce. (See the discussion of the case under Point IV, infra.) Activities identified as intrastate included the maintenance of an office within the state, the assignment of a sales and office staff to work within the state, and the use of such employees to promote sales between retailers and wholesalers located within the state.

4.3.2 Discrimination Against Interstate Enterprises

It is clearly established that state regulations may not single out and discriminate against interstate commerce or enterprises of extrastate origin in favor of intrastate commerce or enterprises.^{13/} Thus if a state were to impose more burdensome requirements upon (or grant fewer privileges to) higher education institutions or programs engaged in interstate commerce than it does upon those operating purely intrastate, or if it imposed more burdensome requirements on (or granted fewer privileges to) foreign educational corporations than upon domiciliaries, the regulations would likely contravene the commerce clause. States must treat interstate education activities in an evenhanded, non-discriminatory manner.

4.3.3 Protection of Local Economic Interests

Where a state's regulations are applied in common to both inter and intrastate enterprises in a particular field, they may nevertheless be invalid under the commerce clause if their predominant purpose and effect is to protect local economic interests at the expense of interstate commerce. The leading case is Baldwin v. Seelig, where New York State sought to apply its minimum purchase price regulations to a New York milk dealer purchasing milk in Vermont. The Supreme Court unanimously invalidated this application of the law because "the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition with the products of another state or the labor of its residents..."^{14/}

While economically based state regulations are thus highly suspect under the commerce clause, they are not invariably invalid. In Milk Control Bd. v. Eisenberg Farm Prods.^{15/} for instance, Pennsylvania applied licensing, bonding, and minimum purchase price regulations to a domiciliary milk processor buying in-state for shipment out-of-state. The Supreme Court upheld the regulatory scheme because it promoted local interests in fair-dealing and general economic well-being by aiming primarily at local industry and only incidentally burdening interstate commerce. But when the state's regulatory involvement is

¹³ See, e.g., Hale v. Bimco Trading Co., 306 U.S. 375 (1939); Welton v. Missouri, 91 U.S. 275 (1876). Cf. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (state regulation found to discriminate against interstate commerce even though it also applied to some intrastate commerce).

¹⁴ 294 U.S. 511, 522, 527, (1935). See also Polar Ice Creame & Creaming v. Andrews, 375 U.S. 361 (1964) (Florida milk purchase and allocation scheme unanimously invalidated on authority of Baldwin).

¹⁵ 306 U.S. 346 (1939).

more clearly based upon economic protectionism or has more substantial anti-competitive effects--in short, where the regulation is "imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests"--the regulation will fall under the commerce clause.^{16/}

This principle would have its clearest application to higher education in situations where a state seeks generally to restrict the number of new schools or programs, or specifically to restrict the number of innovative schools or programs, establishing operations within the state. Even though such regulations applied alike to in-state and foreign institutions, their application to the latter would be constitutionally suspect if based primarily upon economic anti-competitive considerations. In H.P. Hood and Sons v. DuMond, for example, a Massachusetts dairy corporation operated three milk receiving depots in New York at which it purchased milk from New York producers and shipped it to Massachusetts for sale. When the corporation applied to the New York Commissioner of Agriculture for a license to establish a fourth such depot, he rejected the application. The ground for denial was the Commissioner's inability to make the required statutory finding that "issuance of the license will not tend to a destructive competition in a market already adequately served..." The Supreme Court overturned the Commissioner's decision under the general principle that "the State may not promote its own economic advantages by curtailment or burdening of interstate commerce."^{17/}

¹⁶H.P. Hood & Sons v. DuMond, 336 U.S. 525, 530-31 (1949) (5-4 decision distinguishing Eisenberg, supra.) See also Polar Ice Cream & Creamery, supra note 10, a later dairy case where the Court emphasized the same point: "[T]he State may not, in the sole interest of promoting the economic welfare of its dairy farmers, insulate...[its] milk industry from competition from other States." Id. at 377.

¹⁷H.P. Hood & Sons v. DuMond, supra note 11, at 532, citing Baldwin v. Seelig, supra note 10. See also Buck v. Kuy Kendall, 267 U.S. 307 (1925), where the Court invalidated a state refusal to issue a certificate of "public convenience and necessity" to an interstate common carrier because the territory where the carrier planned to operate was already adequately served.

4.3.4 Validity of State Regulation

So long as the state avoids the pitfalls described in Points 4.3.2 and 4.3.3, it may exercise considerable regulatory authority, under its police powers, over higher education operations touching upon or affecting interstate commerce. The general rule, reaffirmed by a unanimous Supreme Court in 1970, is that:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.^{18/}

The promotion of local health and safety is clearly a "legitimate local public interest" under this rule.^{19/} So too is prevention of "fraud, misrepresentation, incompetence, and sharp practice," and promotion of "responsibility and fair dealing"^{20/} interests particularly applicable to regulation of higher education. But as Point 4.3.3 above suggests, economic interests are not always legitimate. The Court generally distinguishes between economic and other state interests, as Hood, supra, explains:

[The] distinction between the power of a State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.^{21/}

While some interests generally characterizable as "economic" may remain legitimacy even under this standard,^{22/} they are not likely to be weighed as heavily by the courts as interests in health, safety, and fair-dealing.

¹⁸ Pike v. Bruce Church, 397 U.S. 137, 142 (1970). See also Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

¹⁹ See, e.g., Huron Portland Cement v. Detroit, 362 U.S. 440 (1960) (health); South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938) (safety).

²⁰ Robertson v. Calif., 328 U.S. 440 (1946); Union Brokerage v. Jensen, 322 U.S. 202 (1944); see also California v. Thompson, 313 U.S. 109 (1941) ("Fraudulent or unconscionable conduct... is peculiarly a subject of local concern and the appropriate subject of local regulation").

²¹ Id. at 533.

²² See generally Point III, supra. Compare H.P. Hood & Sons v. DuMond, supra note 11, at 552-555 (Block, J., dissenting) and 569-573 (Frankfurter, J., dissenting).

Moreover, even these latter interests may be scrutinized by the courts to determine their strength in the context of a particular case. It is not enough that the State put a legitimate label on its alleged interest; the interest must be real and demonstrable,^{23/} and it must not be invoked to justify what is actually an attempt to protect local economic advantage.^{24/}

Once a legitimate state regulatory interest is identified, and evaluated, the next step is to trace the nature and extent of burden which the regulation imposes upon interstate commerce. If, for instance, a state were to regulate certain aspects of higher education to promote fair dealing, the strength of the state interest would be weighed against the burden which the regulation places on the interstate operations of the regulated programs or institutions. The heavier the burden, the more likely the regulation will be invalid under the commerce clause even if it promotes a strong state interest.^{25/}

The Supreme Court has permitted states a wide range of authority under the legal formulation set out in this Point. Usually the state is best off if its regulation is premised upon some local event which can be segmented from purely interstate activity and separately identified as an appropriate subject of state regulation. In Eli Lilly v. Sav-On-Drugs,^{26/} for instance, the Court held that a foreign corporation doing interstate business can be required to register in a state where it also does a substantial amount of intrastate business. The corporation's intrastate and interstate operations were viewed as separable, and the substantial intrastate business was considered appropriate for state regulation which the corporation could not "escape...merely because it is also engaged in interstate commerce."^{27/} But in an earlier case cited approvingly in Eli Lilly, International Textbook v. Pigg (see Section 4.3.1 above), where the foreign corporation's local business was insubstantial and merely incidental to its interstate business, registration requirements were held invalid.

²³ See Southern Pacific Co. v. Arizona, *supra* note 13.

²⁴ H.P. Hood & Sons v. Dumond, *supra* note 11, at 538; See Dean Milk Co. v. City of Madison, *supra* note 9; Collins v. New Hampshire, 171 U.S. 30 (1898).

²⁵ See Pigg v. Navajo Freight Lines, 359 U.S. 520 (1959).

²⁶ 366 U.S. 276 (1961).

²⁷ *Id.* at 279.

Similarly, in California v. Thompson,^{28/} the Court permitted the licensing and bonding of a local transportation agent selling interstate trips because he was not engaged in the interstate transportation itself and licensing him did not restrict the interstate flow of traffic. In Union Brokerage v. Jensen,^{29/} the Court permitted the licensing of a foreign corporation engaged in custom house brokerage of foreign commerce because the corporation had "localized its business"^{30/} and Minnesota had a "special interest... brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce"^{31/} And in Robertson v. California,^{32/} the Court permitted licensing and bonding of insurance agents representing foreign corporations because the regulations applied only to agents acting within the state and the state had a "special interest" in the agent's localized pursuit of his phase of the interstate insurance business.

These cases illustrate the breadth of authority a state retains under the commerce clause to regulate higher education, including foreign institutions establishing programs or appointing agents in the state. But the legal formulation set out in this Point does contain limits which narrow the state's authority even where it has met the requirements in Points 4.3.3 and 4.3.4 above. In particular, a state apparently cannot require the registration of a foreign school whose business is exclusively (or almost exclusively) interstate.^{33/} A state cannot entirely exclude a foreign corporation engaged in interstate commerce except for the most compelling reasons.^{34/} Any financial burdens which a state imposes upon interstate business must be "sufficiently small fairly to represent the cost of governmental supervision"^{35/} of the enterprise entering the state, and other burdens must be limited to those necessary "for the protection of the local interest affected..."^{36/}

²⁸ 313 U.S. 109 (1941).

²⁹ 322 U.S. 202 (1944).

³⁰ Id. at 210.

³¹ Id. at 212.

³² 328 U.S. 440 (1946).

³³ International Textbook Co. v. Pigg, Point I, supra. See generally Annot., 92 ALR 2d 522 (1963). But see Fry Roofing Co. v. Wood, 344 U.S. 157 (1952) (state may license common carrier engaged exclusively in interstate commerce when there is no discretion to deny license and no burdensome conditions attach); Robertson v. Calif., supra note 15.

³⁴ Robertson v. Calif., supra note 15, at 449, 459-60; Sioux Remedy Co. v. Cope, 235 U.S. 197, 201-04 (1914); cf. Edwards v. Calif., supra note 7.

³⁵ Union Brokerage v. Jensen, supra note 15, at 210.

³⁶ Robertson v. Calif. supra note 15, at 459; see Dean Milk Co. v. City of Madison, supra note 9.

4.4 Legal Restraints on State Regulations of External Degree Programs: Due Process of Law

4.4.1 Substantive Due Process

State licensing and regulation of higher education raises some of the most fundamental questions of American legal and political thought.^{1/} The proliferation of state controls has raised problems of fairness, protectionism, academic freedom, and repressiveness, yet often important consumer interest are denied the protection of the state that they require.

This discussion treats questions of the legal limits, other than the commerce clause limits discussed above, on a state's power to regulate private higher education. These limits, unlike those under the commerce clause, do not depend on a finding that a school is engaged in interstate activity. Specific legal criteria and their application to existing and new schools are explored; problems arising from the nature of the authority given to an administrative body, and the problem of granting power to private groups is considered; finally, the procedural safeguards that clothe the school's relationship with the state are presented.

The state, acting under its police powers, may regulate private schools within the limits of the school's due process rights.^{2/} The due process clause, once widely used by courts to invalidate legislation^{3/} retains some of its

¹ This is the question of the proper balance between the individual's "right" to pursue an occupation, and the state's role in regulating individual's activities for some common good. For a broader discussion of the issues raised by state licensure see Reich, The New Property, 73 Yale L.J. 733 (1964). Critics of occupational licensure include the following. (cited in Wallace, Occupational Licensing, 14 WM. & MARY L. REV. 46, 48 n. 10): A. FRIEDMAN, CAPITALISM AND FREEDOM 137-60 (1962); W. GELHORN, INDIVIDUAL FREEDOM and GOVERNMENTAL RESTRAINTS 105-51 (1956); D. Lees, Economic Consequences of the Professions (1966); Doyle, The Fence-Me-In Laws, 205 Harpers 89 (1952); Graves, Professional and Occupational Restrictions, 13 TEMP. L.Q. 334 (1939) Haut & Hamrick, Haphazard Regimentation Under Licensing Statutes, 17 N.C.L. REV. 1 (1938); Silverman, Bennett & Lechlitter, Control by Licensing Over Entry into the Market, 8 LAW & CONTEMP. Probl. 234 (1941)).

² State v. Williams, 253 N.C. 337, 117 SE 2d 444 (1960); State v. Nuss, 114 N.W. 2d 633 (S.D. 1962); 66 Am Jur 2d Schools 309 (1965).

³ Representative Supreme Court cases which utilize substantive due process concepts are: Cappage v. Kansas, 326 U.S. 1 (1944) Lochner v. New York, 198 U.S. 45 (1909).

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The Supreme Court, and other federal courts, no longer invalidates legislation on the basis of substantive due process. See, North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 94 S. Ct. 407 (1973) (reversing state decision which relied on substantive due process to invalidate a state requirement that pharmacies not be operated by corporations, unless pharmacists controlled the corporations); Lee Optical Co. v. Williamson, 348 U.S. 483 (1955); United States v. Caroline Products, 304 U.S. 144 (1938). Nebbia v. New York, 291 U.S. 502 (1933) ("The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of businesses may be prohibited; and the right to conduct a business, or to pursue a calling, may be prohibited.") (citations omitted)

former powers in the state courts, where regulatory schemes are still scrutinized for deficiencies under the due process guarantees of the state constitutions.^{4/} The application of substantive due process to invalidate a statute depends on whether the statute regulates a business which is affected with a public interest (a "natural monopoly") and whether the statute is designed to protect the general welfare. Licensing requirements and regulations, imposed on occupations and businesses under the former rationale have been accorded varying treatment in the state courts. Regulation has generally been upheld where the public interest involved is found to be substantial,^{5/} and the burden imposed not undue.^{6/}

Relatively little authority exists concerning the permissible limits of schools regulation.^{7/} An early case made it clear that states cannot arbitrarily interfere with schools.^{8/} A statute prohibiting certain private schools from collecting more than \$25 tuition in advance was found to fit this description.^{9/}

⁴ See Paulsen, *The Persistence of Substantive Due Process in the States*, 34 Minn. L. Rev. 91 (1950); Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 N.W. U.L. REV. 226, 244-48 (1958) [hereinafter cited as HETHERINGTON]. Cases illustrating the application of the doctrine in the state courts are: Pennsylvania State Board of Pharmacy v. Pastor, 272 A.2d 487 (1971) (statute which prohibited advertising of drug prices unconstitutional); Estell v. City of Birmingham, 286 So 2d 866 (Ala. Ct. Crim. App. 1973) ("anti-scalping" statute unconstitutional); People v. Brown, 407 Ill. 565, 95 N.E. 2d 888 (1950) (licensing requirement for plumbers unconstitutional); Moore v. Sutton, 185 Va. 481, 39 S.E.2d 348 (1946) (licensing requirement for photographers unconstitutional). Although the state courts are bound by the Supreme Court's interpretation of the 14th Amendment, and therefore seemingly obliged to reject the substantive due process doctrine, the state courts have continued to apply substantive due process. This circumvention of current federal constitutional doctrine has been accomplished in some cases by reliance on due process provisions of state constitutions, and in other cases by inattention to more recent pronouncements of the Supreme Court.

⁵ Hetherington at 229.

⁶ Hetherington at 240, 234 n. 154.

⁷ A good discussion of prior cases is found in State v. Williams, 253 N.C. 337, 117 S.E. 2d 444 (1960).

⁸ Pierce v. Society of Sisters, 268 U.S. 510 (1924). This case established that schools have a constitutional right to due process.

⁹ State v. Nuss, 114 N.W. 2d 633 (S.D. S. Ct. 1962).

New York's private trade school act was found unconstitutional insofar as it directed the Regents' to condition licenses on their approval of the tuition charged by these schools.^{10/} A state cannot regulate schools teaching a foreign language in an oppressive manner.^{11/} A statute which prohibited a lawful educational corporation from operating without the consent of the voters in the area was held unconstitutional.^{12/} On the other hand, the state may require schools to procure licenses to operate,^{13/} and regulate the granting of degrees^{14/} and the name used by a college.^{15/}

The principle which emerges from these cases is that "[t]he state has a limited right, under the police power, to regulate private schools and their agents and solicitors, provided: (1) there is a manifest present need which affects the health, morals or safety of the public generally, (2) the regulations are not arbitrary, discriminatory, oppressive or otherwise unreasonable..."^{16/}

Because of the importance of education to the public, and the difficulty of protecting consumers from unscrupulous practices, courts are unlikely to invalidate most regulatory schemes.

State regulatory schemes are more likely to encounter difficulties when their purpose is to limit the number of schools operating in a given area. An example of this sort of regulation is seen in New York, where permission to operate in the state is dependent on a showing of "need" for the proposed institution.^{17/} When the regulation imposed is this burdensome, the state

¹⁰ Grow System School v. Board of Regents, 277 App. Div. 122, 98 NYS 2d 834 (S. Ct. 1950).

¹¹ Farrington v. Tokushige, 11 F.2d 710 (9th Cir. 1926); see Mayer v. Nebraska, 262 U.S. 390 (1923).

¹² Columbia Trust Co. v. Lincoln Institute of Kentucky, 138 Ky. 804, 129 SW 113 (Ct. App. 1910).

¹³ People v. American Socialist Soc., 202 App. Div. 640, 195 NYS 801 (Sup. Ct. 1922) (upheld against First Amendment and due process challenge requirement that school not allow teaching or overthrow of government).

¹⁴ Shelton College v. State Board of Education, 48 N.J. 501, 226 A.2d 612 (1967).

¹⁵ Institute of the Metropolis, Inc. v. University of the State of New York, 274 N.Y. 504, 10 N.E. 2d 504 (1937).

¹⁶ State v. Williams, 253 N.C. 337, 117 S.E. 2d 444, 450 (1960).

¹⁷ §§3.56, 5.21 of Title VIII of the Official Compilation of Codes, Rules, and Regulations of the State of New York.

must demonstrate that the business so regulated is affected with a "public interest." This is often traced to a now discredited Supreme Court decision, in which the Court invalidated a requirement that ice companies procure a certificate of necessity prior to operation.^{18/} The Court held this form of regulation was unconstitutional because manufacturing ice was an "ordinary business", which was "essentially private" in nature, and not a "natural monopoly", or an "enterprise in its nature dependent upon the grant of public privileges".^{19/} The opinion also referred to a "[c]ommon right to engage in a lawful private business." Justice Brandeis' dissent indicated the direction the Court would take later. The present status of Liebmann and the "affected with a public interest" doctrine in the federal courts is treated in Boylan v. United States.^{20/}

Many states have certificate of need requirements that apply to new hospital construction.^{21/} This article is an extensive examination of the efficacy of certificates of need as a device to regulate the growth of hospitals. The Supreme Court of North Carolina, which has a long history of searching legislation for violations of substantive due process^{22/} declared this requirement to be a violation of due process clause of the state's constitution because the court could find no benefits accruing to the public from the requirement. The court explained that although the state's right to regulate hospitals was undisputed when the "right to engage in a business" is withheld a strong sharing of public advantage must be made. A New York court considering a similar statute applied to nursing homes held the statute was constitutional.^{23/}

¹⁸ New State Ice Co. v. Liebmann, 285 U.S. 262, (1931).

¹⁹ 285 U.S. at 277, 279.

²⁰ 310 F. 2d 493 (9th Cir. 1962).

²¹ Havighurst, "Regulation of Health Facilities and Services by Certificate of Need", 59 VA. L. Rev. 1143, 1144 (1973).

²² See, State v. Ballance, 229 N.C. 764, 51 S.E. 2d 731 (1949); Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957).

²³ Attoma v. State Department of Social Welfare, 26 App. Div. 2d 12,270 NYS 2d 167 (1966).

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A 1948 Pennsylvania case^{24/} concerned the state's attempt to regulate Hertz by requiring it to possess a certificate of public convenience and necessity before it could rent cars. The court held that the business of leasing cars was not sufficiently imbued with a public interest to be subject to this kind of regulation consistently with the due process guarantees of the state and federal constitutions. After observing that there was no certain test for when a business was affected with a public interest, the court concluded that the "capacity for monopolistic use in the performance of a service to the public in general" was a reliable indication that a business was affected with the public interest.^{25/} These cases demonstrate that only when an industry is found to possess the characteristics of a natural monopoly will state legislations restricting entry into the field be upheld.

The economic justification for state perpetuation of a monopoly is readily apparent when discussing telephone companies or other public utilities where inefficiency in use of resources will lead to detriment to the consumer. However, restricting the number of competitors in an industry that is not a natural monopoly^{26/} will work a sacrifice of the ordinary benefits of competition.

"The belief that competition results in deterioration of a product is true only in the pure public utility case. In other situations competition tends to improve the "quality" of the product. More importantly, competition widens the range of types of goods that are available to buyers. If competition among liquor dealers lowers the price of existing liquor and brings into the market additional lower priced liquors, the consumer benefits since he has wider range of choices."^{27/}

24 Hertz Drivyrself Stations v. Siggins, 359 Pa. 25, 58 A. 2d 464 (1948).

25 58 A. 2d at 471. Two other cases following Hertz have struck down certificate of need requirements applied to the renting of motor vehicles: Hertz Corp. v. Heltzel, 217 Ore. 205, 341 P. 2d 1063 (1959), and State ex rel Schrath v. Condry, 139 W. Va. 827, 83 S.E. 2d 470 (1954). One case which reached a contrary decision is, Corpus Christi v. Texas Driverless Co., 187 S.W. 2d 484 (Tex. Civ. App. 1945, modified on other grounds, 144 Tex 288, 190 S.W. 2d 484. A good discussion of constitutional limitations on certificate of need requirements is found in Visco v. State, 95 Ariz. 154, 388 P.2d 155 (1964).

26 The nature of a "natural monopoly" is explained in the passage from Barro's Business and Professional Licensing-California, A Representative Example, 18 STAN. L. REV, 640, 642 (1966): Conceptually, there are industries in

which the nature of the resources that are used in production is such that one producer can supply the entire market for the product at a lower real cost (use fewer resources) than can several producers. In this natural monopoly situation the existence of more than one producer will have one or both of two effects: (1) Each seller will have excess capacity, and such capacity, together with low or declining costs of using it, will lead to successive price reductions until the price of the product declines to the level of out-of-pocket costs. Eventually, only one seller will survive, and the consumer will be faced with a true monopoly. (2) While this "ruinous" competition continues, firms, in an effort to cut costs, may reduce the quality of the product to the detriment of the buyer.

Where this condition is thought to exist, the police power may be used to grant monopolistic production of the product by means of a public utility "license." The price and output of the public utility are regulated by the public in an effort to secure production of the product at nonmonopolistic prices.

27

Id. at 658.

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There are no reported cases concerning the constitutionality of a requirement of a certificate of need to operate a school. If the "natural monopoly" justification is a prerequisite to this form of regulation, then it seems unlikely that higher education can be so regulated. Although an overabundance of schools creates a drain on the state's educational resources, less drastic measures than limiting the entrance of new schools can be devised to prevent waste.

One commentator urged courts to consider whether legislatures might have used less extreme measures to accomplish their goals.^{28/}

In conclusion, most state regulation of higher education is within the bounds of even the most strict interpretation of the state's authority under the due process clause. However, state regulation which is so extreme as to actually prohibit the operation of a school for reasons unrelated to its educational quality may encounter difficulties in some state courts.

²⁸

Struve, The Less-Restorative-Alternative Principle and Economic Due Process, 80 HARV. L. REV 1463 (1967).

4.4.2 Procedural Due Process

The most important safeguards provided under the rubric of "due process" are the panoply of procedural rights assured one who is harmed by state action. Without case law on the rights of school licensees one cannot determine exactly what procedures are required at each stage of administrative action, but the parameters of due process can be determined.

The basic rule governing due process is that the

"extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'.... Accordingly... 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action'".^{29/}

A recent case, Blackwell College of Business v. Attorney General,^{30/} is illustrative of the due process requirements that schools have with reference to governmental licensing.

The college was approved by the Immigration and Naturalization Service (INS) for attendance by nonimmigrant alien students. INS, on the basis of an investigation it had undertaken, informed the school that its approval was to be withdrawn, and then gave it an opportunity to have an "interview" with an administrative officer. The administrative officer was the same person who had informed the school of the withdrawal of approval. Finally, no participation by counsel was afforded. The court characterized the proceedings as "formless and uncharted".^{31/}

The court's enumeration of procedures that must be followed in the future comprise a checklist for due process scrutiny. First, notice that it specifies in reasonable detail that grounds of dissatisfaction must be given^{32/}

²⁹ Richardson v. Perales, 402 U.S. 389, 401-02 (1970); quoting from Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

³⁰ 454 F. 2d 928 (D.C. Cir. 1971).

³¹ Id.

³² The court also concluded that INS was subject to the Administrative Procedure Act, which requires that before an agency institutes proceedings, it give (1) notice and (2) "opportunity to demonstrate or achieve compliance with all lawful requirements," (5 U.S.C., para 558(c)). This procedure is not necessarily required of agencies not subject to the APA.

A hearing must be provided, before a different administrative officer than the one who did the initial investigation.

The nature of the charge against the school determines the school's right to confront and cross-examine witnesses. If the charge involves documentary records, then the school may contest the records with other records or live witnesses. If the charge is founded on hearsay (which is not admissible under an exception to the hearsay rule) then the school has a right of cross-examination and confrontation.

Counsel is permitted in all proceedings, and a record must be made.

Most cases involving the withdrawal of a license to operate, or other equally important state action, would seem to call for procedures at least as strict as these.^{33/}

The most serious due process deficiency of state licensing boards is the presence of members of the regulated industry on the decision-making board. The Supreme Court has said that "(a)n impartial decision maker is essential."^{34/} Thus, the issues of fairness implicit in an argument against delegation to private parties become paramount under due process. Gibson v. Berryhill^{35/} involved a conflict between independent optometrists (the Association) and optometrists who were employed by other persons. Alabama had established a state licensing board, which was restricted in membership to optometrists who belonged to the Association. Under these circumstances, the Court concluded that the Board should not adjudicate proceedings involving the non-Association members, because the Board members has a pecuniary interest in the outcome.^{36/}

33

In Blackwell, the court stated that Blackwell's "[a]pproval status was a valuable asset in the nature of a license...", but did not discuss the degree of harm visited on the aggrieved school. However, the court did state that the interest of the government was that approval be withdrawn only after due process was given, because of the government's interest in allowing students to enter. This reasoning would eliminate a need to balance the government's interest against that of the individual, because there is always a governmental policy that programs be fairly administered, and would lead to the conclusion that full due process should always be accorded.

34 Goldberg v. Kelly, 397 U.S. 254, 271 (1969).

35 411 U.S. 564 (1973).

36 But see, People v. Murphy (364 Mich. 363, 110 N.W. 2d 805 (1961)), where on similar facts the opposite decision was reached.

8.4.3 Delegation of Legislative Power

Legislative acts establishing a licensing scheme for schools may simply name a board and direct it to issue or withhold licenses. The act may note the problem perceived by the legislature, the general areas in which criteria must be met, and even specific requirements to be satisfied by applicants. The bodies to which authority is delegated may or may not adopt regulations and procedures for review of its decisions.

The question which arises when power to implement an Act is given to an administrative agency is whether there has been an unconstitutional delegation of legislative power.^{37/} It is traditionally believed that "the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority".^{38/} Courts have attempted to distinguish between administration of a law, and the "making" of a law.^{39/}

Two cases involving regulation of private schools illustrate the application of these principles. In Packer Collegiate Institute v. University of State of New York 40/ a private school refused to register with the regents of New York, instead moving for a declaratory judgment that was unconstitutional. The statute requiring registration contained no standards circumscribing the Regents' authority, stating simply that schools must register "under regulations prescribed by the board of regents"^{41/}

³⁷ The federal courts are no longer likely to find an unconstitutional delegation of power, but the doctrine persists in many state courts. Davis, Administrative Law Text 2.06 (1972).

³⁸ Cooley, Constitutional Limitations 163 (7th ed. 1903). The Constitutional logic underlying this belief is that: Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

³⁹ The distinction made is "[b]etween the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law." Cincinnati, W.8 Z.R. v. Clinton, 1 Ohio St., 77,88 (1852), quoted with approval in Field v. Clark, 143 U.S. 649, 693-94(1892). See DAVIS, ADMINISTRATIVE LAW TEXT 2.06 (3rd ed. 1972) for an excellent discussion of this issue.

⁴⁰ 298 N.Y. 184, 81 N.E. 2d 80 (1948).

⁴¹ 81 N.E. 2d at 81.